SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 61

E. S. EVANS, ET AL., PETITIONERS,

vs.

CHARLES E. NEWTON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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[fol. 1]

IN THE

SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

Rev. E. S. Evans, et al., Intervenors, Plaintiffs in error,

v.

Charles E. Newton, et al., Defendants in error.

Bill of Exceptions—Filed May 8, 1964

To the Honorable Chief Justice and the Honorable Justices of the Supreme Court of Georgia:

Be It Remembered that on February 5, 1964, there came on for hearing in Bibb Superior Court before the trial judge, the Honorable Oscar L. Long, a Motion for Summary Judgment which had been submitted by the petitioners, defendants-in-error, after which arguments and authorities were submitted to the Court by parties for each side. Thereafter, and on the 10th day of March, 1964 the said trial judge entered his order and decree granting the said motion.

To the said Order of the said trial judge the plaintiffs-in-error did except, now except and assign the ruling of the trial judge as reflected in his decree and order as being contrary to the law and facts in the case. Plaintiffs-in-error contend that said Order denies equal protection to the plaintiffs-in-error and others similarly situated as guaranteed by the Fourteenth Amendment to the United States Constitution, for the reason that said Order has the effect of prohibiting Negroes from the use of the park which is the subject matter of this litigation. Further, plaintiffs-in-error contend that said ruling, order and decree also denies to the plaintiffs-in-error, and others similarly situated, equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution,

in that, this said Court has accepted the resignation of the City of Macon as Trustees and appointed new Trustees for the purpose of enforcing the provisions of the Last Will and Testament of A. O. Bacon which contains a racially discriminatory testamentary provision and which plaintiffs-in-error contend was originally commanded by the State.

Error is further assigned to the said Order on the ground, and the plaintiffs-in-error contend, that Section 108-202, Georgia Code Annotated, 1933 Edition, has the effect of requiring that the racially discriminatory provisions of the testamentary trust which is a part of the subject matter of this litigation be declared null and void. Said Code Section reads as follows:

> 108-202. (4604) Cy pres.—When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention. (110 Ga. 540, 543 (35 S.E. 639).)

[fol. 2] Plaintiffs in error further assign error to the said trial judge's said ruling, order and decree on the ground that the Acts of Georgia of 1905, page 117, commonly referred to as Georgia Code Section 69-504, hereinafter set out, is violative of the equal protection clause of the Fourteenth Amendment for the reason that said provision prescribes racial discrimination and since the racially discriminatory provision in A. O. Bacon's Last Will and Testament, the plaintiffs-in-error contend, was dictated by that unconstitutional statute which received enforcement by said statute, all in violation of the Fourteenth Amendment to the United States Constitution, Sec. 1. Said Act reads as follows:

> 69-504 (890) Gifts for public parks or pleasure grounds.—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated

in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property. (Acts 1905, p. 117.)

Plaintiffs-in-error specify as material to a clear understanding of the errors complained of the following portions of the record, to wit:

1. Petition, filed May 4, 1963.
2. Answer of the City of Macon, filed May 20, 1963.
3. Answer of Guyton G. Abney, J. D. Crump, T. I. Denmark and W. G. Lee, as Trustee successors under the Last Will and Testament of A. O. Bacon.
4. Motion for Summary Judgment dated May 27, 1963.
5. Motion of Rev. E. S. Evans, et al. to intervene, dated May 29, 1963, with order thereon.
6. Intervenors Petition filed June 18, 1963.
7. Amendment to Petition filed January 8, 1964.
8. Petition for intervention and order thereon dated January 8, 1964.
9. Amendment to answer and Cross Bill, with order thereon, filed January 8, 1964.
10. Amendment to answer of City of Macon, filed February 5, 1964.

11. Amendment of Intervenors' Petition, filed March 5, 1964.

12. Trial Judge's Order and Decree dated March 10, 1964.

13. Resignation of City of Macon as Trustees.

14. Acceptance of Trust filed March 12, 1964.

[fol. 3] And Now, come Rev. E. S. Evans, et al., within the time provided by law, and assigning error on all the rulings complained of as being contrary to law, tender this their Bill of Exceptions and pray that the same may be certified to and transmitted to the Supreme Court of Georgia in order that the alleged errors may be considered and corrected, all as provided by law.

Donald L. Hollowell, William H. Alexander, Attorneys for Plaintiffs-in-error.

859½ Hunter St. N.W., Atlanta, Georgia 30314, Jackson 5-8372.

[fol. 4]

JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS —April 14, 1965

I do certify that the foregoing Bill of Exceptions was tendered to me on the 9th day of April, 1964, that the same is true and specifies all the evidence, and specifies all of the record material to a clear understanding of the errors complained of and the Clerk of the Superior Court of Bibb County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this Bill of Exceptions specified, and of the record in said case as are in this Bill of Exceptions specified, and certify the same as such and cause the same to be transmitted to the Supreme Court of Georgia, that the errors alleged to have been committed may be considered and corrected.

This 14 day of April, 1964.

O. L. Long, Judge, Bibb Superior Court.

[fol. 5] The within and foregoing Bill of Exceptions tendered this 9 day of April, 1964.

O. L. Long

[fol. 6] Acknowledgments of Service by Attorneys for Defendants-in-Error (omitted in printing).

[fol. 8] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 10] [File endorsement omitted]

[fol. 12]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

PETITION—FILED May 4, 1963

Charles E. Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, George P. Rankin, Jr., Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody, all of said State and County, in their respective capacities as members of the Board of Managers of Baconsfield, hereinafter referred to as the "Board", bring this bill in equity and name as defendants the following parties:

The City of Macon, in its capacity as Trustee under Item 1X of the Last Will and Testament of Augustus Octavius Bacon, deceased:

Guyton G. Abeny, J. D. Crump, T. I. Denmark and Dr. W. G. Lee, as successor Trustees under the Last Will and Testament of Augustus Octavius Bacon, Deceased, holding assets for the benefit of certain designated beneficiaries who will take the residuary estate under the terms of said Will, but subject to the provisions of Item 1X thereof as herein more fully set forth.

1.

This Honorable Court has jurisdiction of this proceeding in that all of the defendants against whom substantial relief is prayed herein are residents of Bibb County, [fol. 13] Georgia; and for the further reason that the trust assets, as hereinafter described and which form the subject

matter of this bill in equity, are situate in said State and County.

2.

Your petitioners are the duly qualified and acting members of the Board of Managers of Baconsfield, created and established under the provisions of Item 1X of said Last Will and Testament of Augustus Ocavius Bacon.

3.

The defendant the City of Macon is a municipality duly created by Act of the Legislature of the State of Georgia, and, under said Item 1X of said Will, holds, as Trustee, the legal title to that tract or parcel of land situate in Macon, Bibb County, Georgia, known as "Baconsfield", and more fully described in said Will.

4.

The defendants Guyton G. Abney, J. D. Crump, T. I. Denmark, and Dr. W. G. Lee are successor Trustees under said Last Will and Testament, and codicil thereto, and are duly qualified and now acting in such capacities, respectively.

5.

The Last Will and Testament of Augustus Octavius Bacon, dated the 28th day of March, 1911, and the codicil thereto, dated the 6th day of September, 1913, have been duly probated in solemn form in the Court of Ordinary of [fol. 14] Bibb County, Georgia, a copy thereof being attached hereto as Exhibits "A" and "B" and by reference made a part hereof.

6.

Under Item 1X of said Will the testator conveyed all his right, title and interest in and to Baconsfield, the parcel referred to being fully described in said Item 1X, unto

"The Mayor and Council of the City of Macon", the then designation of the same municipal corporation which is now the "City of Macon".

7.

Your petitioners show that said property was so conveyed to the defendant the City of Macon "in trust for the sole, perpetual and unending use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon, to be by them forever used and enjoyed as a park and pleasure ground", subject however, to the restrictions, government, management, rules and control of the Board of Managers of Baconsfield, your petitioners herein.

8.

Although under the provisions of said Will, the defendant the City of Macon, as Trustee of said properties, is under a paramount duty to carry out the provisions of said trust, the Board has complete and unrestricted control and management of said property, with power to make all needful regulations for the preservation and improvement thereof, and rules for its use and enjoyment, with power to exclude at any time any person or persons of either sex, who may be deemed objectionable, or whose [fol. 15] conduct or character may by said Board be adjudged or considered objectionable, or such as to render for any reason in the judgment of said Board their presence in said grounds inconsistent with or prejudicial to the proper and most successful use and enjoyment of said property for the purposes contemplated by the testator.

9.

As directed in said Will, the Board has over the years confined the exclusive use of Baconsfield to those persons designated in said Will, although under the provisions thereof it has not objected to the use of said property by

the white men of the City of Macon and white persons of other communities.

10.

Your petitoners show, however, that although they have called the attention of the defendant the City of Macon to the provisions of Item 1X of said Will and its duties as Trustee thereunder, said defendant is now failing and refusing to carry out and enforce the provisions of said Will with respect to the exclusive use of Baconsfield by the white women of the City of Macon and white boys and white girls, and white men when so authorized by the Board, but on the contrary, has recently permitted and is now permitting the continuous use of said premises by members of the colored race, in direct contravention of the terms of the trust created by the testator, and under which said defendant holds title to Baconsfield, and in complete disregard and violation of th explicit mandate of the testa-
[fol. 16] tor as set forth in said Will.

11.

Your petitioners are without power to enforce the terms of said trust with respect to the aforesaid use of Baconsfield, except to request the defendant the City of Macon to comply with the terms of the Trust. If, however, a new Trustee, or new Trustees, are appointed by this Court then, if necessary, said Trustee or Trustees, by the exercise of a writ of mandamus or otherwise could require the defendant the City of Macon or other proper law enforcement officers to carry out their duties so that the terms of the trust, which the City of Macon now is violating in its capacity as Trustee, may be carried out by the new Trustee or Trustees.

12.

Your petitioners show that the aforesaid breach of duty on the part of the defendant the City of Macon, as Trus-

tee, constitutes such a violation of trust as to require its removal as Trustee.

13.

Your petitioners bring this petition for the purpose of removing the defendant the City of Macon as Trustee of said properties, and recommend to this Honorable Court, as a court of equity, that it appoint three (3) freeholders, residents of the City of Macon, to serve as successor Trustees to defendant the City of Macon and who in their capacity as Trustees, being private citizens, can and will under the law carry out the testator's wishes and intent with re- [fol. 17] spect to the use and enjoyment of Baconsfield, and the purposes for which said trust was established.

Wherefore, your petitioners pray:

(a) That process do issue in terms of law;

(b) That the defendant the City of Macon be removed as Trustee under said Will;

(c) That this Court, as a court of equity, enter a decree appointing one or more freeholders, residents of the City of Macon, to serve as Trustee or Trustees under the Last Will and Testament of Augustus Octavius Bacon, deceased, with power on the part of the Board to name, subject to the approval of this Court, from time to time, a successor Trustee or Trustees upon the death or disqualification of any such Trustee, or should any such Trustee for any reason cease to serve in such capacity;

(d) That legal title to Baconsfield, as well as to any other assets now held by the defendant the City of Macon, in its capacity as such Trustee, be decreed to be in the Trustee or Trustees so appointed by this Court, and in their respective successor or successors, for the uses, purposes and trusts originally declared by the testator, Augustus Octavius Bacon;

(e) That your petitioners have such other and further relief as the Court may deem fit and proper.

Jones, Sparks, Benton & Cork, Attorneys for Petitioners.

[fol. 18] *Duly sworn to by Frank M. Willingham, jurat omitted in printing.*

[fol. 19]

EXHIBIT "A" TO PETITION

COPY OF LAST WILL AND TESTAMENT OF AUGUSTUS OCTAVIUS BACON

I, Augustus Octavius Bacon, of said State and County, being in perfect health and of sound and disposing mind and memory, and desiring to make disposition, while so capacitated, of the property which, under Providence, has been the fruit solely of my personal industry and toil, do hereby make, publish and declare this my last Will and Testament, hereby expressly and entirely revoking and cancelling all other Wills heretofore made by me.

Item 1st

I commit my soul to God, in the humble hope that in spite of my many weaknesses, imperfections, faults and misdeeds, I shall be reuinited in a happy immortality with my kindred and friends, and particularly with the members of my immediate family, to whose happiness and welfare my life has been gladly and unsparingly devoted.

Item 2nd

I direct that my body be buried in Rose Hill Cemetery in the lot recently purchased by me, and that the bodies of my two ever-lamented sons, Lamar Bacon, who died on the 21st day of December 1884 and Augustus Octavius Bacon, Jr., who died on the 27th day of November of the same year, shall be removed from the lot in which they are now

interred, and re-interred in the same lot now owned by me, and I further direct that my Trustees hereinafter named, or their successors, shall erect over the graves of myself and of my two sons, and also over the graves of all other [fol. 20] members of my family who shall die during the continuance of the trust herein created, monuments in their discretion suitable and appropriate therefor.

Item 3rd

I direct that all my just debts be paid as early as practicable after my death.

Item 4th

My household and kitchen furniture in the main dwelling house, I give and bequeath to my wife, Mrs. Virginia Lamar Bacon, during the full term of her natural life, to be thereafter disposed of by her will as she may direct.

Item 5th

My household furniture in the little cottage commonly called "The Hut" which I have personally occupied for years, as well as all of my books of every kind whereever located, together with all of my papers, pictures, jewelry, personal apparel and all other similar personal effects, I give to my two beloved daughters, Mrs. Mary Louise Bacon Sparks, and Mrs. Augusta Lamar Bacon Curry, to be divided between them as they shall agree with each other, requesting that they give or transmit to their several children such of said articles as it may be thought they would prize and preserve.

Item 6th

All of my estate both real and personal, of every description, and wherever situate, excepting therefrom only so much thereof as is otherwise disposed of by this Will, either in the clauses precedent or subsequent hereto, I [fol. 21] hereby give, bequeath and devise unto my tried

and trusted friends Alexander Lawton Miller, Custis Nottingham, Richard C. Jordan and Warren Roberts, all of my said bounty, in trust for the persons and purposes hereinafter named and specified, with the estates and remainders, and with the powers and limitations herein specifically designated and set forth as follows:

(a) Except as otherwise specified in this Will, all of the corpus of my said property—including both that held by me in trust, and that held in fee simple—whether consisting of the property as it exists at the time of my death, or of the property into which it may be subsequently converted, or of property subsequently acquired for my estate, shall be held by the said Trustees and their successors in trust for the sole use, benefit and enjoyment of my wife, Mrs. Virginia Lamar Bacon, and of my two daughters, Mrs. Mary Louise Bacon Sparks and Mrs. Augusta Lamar Bacon Curry, for and during the term of their natural lives, and after their several deaths, with the several remainders as herein specified and provided, and to the uses, benefit and enjoyment of the beneficiaries specified thereunder; and to fully effect the same, the said Trustees shall annually, so long as the said Mrs. Bacon, Mrs. Sparks and Mrs. Curry shall all remain in life, pay to each of them one-third of the net annual revenue derived from said property after the payment of all [fol. 22] proper and legitimate expenses incident thereto.

(b) Upon the death of Mrs. Virginia Lamar Bacon, I direct that all of the property specified and embraced within this Item 6th of my Will, including the one-third theretofore held in trust for Mrs. Virginia Lamar Bacon, shall be by the said Trustees divided into two equal parts, one of which parts shall be held by said Trustees in trust for the sole use, benefit and enjoyment of my daughter, Mrs. Mary Louise Bacon Sparks, during the full term of her natural life with the re-

mainders in the same as hereinafter specified, and the net revenues from the same shall during her life be annually paid to her; and the other of said equal parts shall be held by said Trustees in trust for the sole use, benefit and enjoyment of my daughter, Augusta Lamar Bacon Curry during the full term of her natural life, with the remainders in the same as hereinafter specified, and the net revenue from the same, shall during her life, be annually paid to her.

(c) Upon the death of my daughter Mary Louise Bacon Sparks, I direct that the portion of the property embraced in this Item 6th of my Will and held in trust for her during the term of her natural life as aforesaid shall thereafter be held by said Trustees and their successors of the sole use, benefit and enjoyment of the [fol. 23] children now in life of my said daughter, Mary Louise Bacon Sparks. During the full term of the life of Willis B. Sparks, Senior, who married my said daughter, Mary Louise, with remainder after his death to the children of the said children now in life of my said daughter Mary Louise, to-wit: the children of Augustus Octavius Bacon Sparks, Willis B. Sparks, Junior; Virginia Lamar Sparks and of Garton Sparks. But if at the time of the death of my daughter Mary Louise, and any one or more of the said children of my said daughter Mary Louise shall then be in life, the proportionate interest of each of said children of my daughter Mary Louise shall then vest in said child in fee simple, and thereupon the said trust to that extent shall cease and terminate. If during the life of the said Willis B. Sparks, Senior, and after the death of my daughter, Mary Louise, any one of her said children hereinbefore named, shall die leaving neither husband, nor wife, nor child, the interest of said child so dying shall thereupon descend to, and enure in equal parts to the benefit of the survivors of the said children, and shall thereafter during the continuance of this trust, be held by the said Trustees for the use,

benefit and enjoyment of the survivors of the said children. The intent and purpose of this provision of my Will is that in no event and under no circumstances shall the trust cease and the title in and to said prop- [fol. 24] erty, or any part thereof, vest in fee simple, in either of my said daughter Mary Louise, or in any of her descendants, during the term of the natural life of the said Willis B. Sparks, Senior; and further that the remainders hereinbefore specified shall be preserved and take effect after the death of the said Willis B. Sparks, Senior.

(d) Upon the death of my daughter, Augusta Lamar Bacon Curry, I direct that the portion of the property embraced in this Item, and held in trust for her during the term of her natural life as aforesaid, shall thereafter be held by said trustees and their successors, for the sole use, benefit and enjoyment of the children now in life of my said daughter, Augusta Lamar, to-wit: Shirley Holcomb Curry, Marie Louise Curry and Manly Lamar Curry, until her youngest child, the said Manly Lamar Bacon Curry, shall reach the age of twenty-one years, when the proportionate part of said property, shall vest in each of said children, and the trust, to the extent thereof in said property, shall thereupon cease and determine. But if either of the said named children or my said daughter, Augusta Lamar, shall, without leaving husband, or wife or child, die before the said Manly Lamar Bacon Curry shall reach, or would, if in life, reach the age of twenty-one years, the portion of the said child so dying shall thereafter be held in trust for the use, benefit and enjoyment of the survivors of the said named children; [fol. 25] and if either of the said named children of my said daughter, Augusta Lamar, shall, before the said Manly Lamar reaches, or would, if in life, reach the age of twenty-one years, die leaving a child or children in life, the portion of the child so dying shall be

held in trust for his or her surviving child or children until they severally arrive at the age of twenty-one years.

Item 7th

To my said Trustees hereinbefore named, and to their successors, I give full power and authority to sell so much of the property of my estate as is embraced in the foregoing Sixth Item of this Will, both real and personal or any part thereof in their discretion, and to make conveyances thereof, with full and perfect title free from said trusts, limitations and remainders, to the purchasers of the same without any authority asked from or granted by any court, or officer or any person whomsoever; said sales to be at either public or private sale, and no such terms as they in their discretion shall determine, and either with or without public or other advertisement of the same. But the net proceeds of all such sales, except as otherwise provided in this Will, shall be by the said Trustees reinvested in other real estate in the State of Georgia; which said real estate, when thus purchased for reinvestment, shall in each and every particular be held in the name of said Trustees or their successors subject to the same trusts and uses, and limited to the same estates and remainders as are specified in the foregoing Sixth Item of this Will; and the [fol. 26] title deeds taken to said real estate shall, by reference to this Will express that the same is conveyed for said trusts and uses, and with the said estates and remainders as are herein specified. The books of said Trustees shall contain an accurate and complete statement of all real estate and other property sold and purchased on account of said trust estate, and also accurate accounts of all monies received and disbursed on account of said estate. I urge the said Trustees in this connection not to sell the real property of my estate hurriedly, but only when the same can be done to the best advantage, as the said property can in large part be used in such manner as to provide revenue, and the said property will in a reasonable short

time be very valuable for sale for residence purposes. The power to sell I intend to embrace in all its features and requirements and exemptions, the power to lease or rent.

Item 8th

During the lives of Mrs. Virginia L. Bacon and of my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, it is my will that they shall each receive annually through said Trustees, from my estate at least the full sum of $1,200.00. If the one third of the net annual revenues derived from my estate does not in any year furnish an amount sufficient to pay the full sum of $1,200.00 to each of them, I direct that the deficiency be made up by taking from the amount received from the sales of property embraced in Item Sixth of this Will, as much as will be necessary to give to each of the three, the said full sum of $1,200.00.

[fol. 27] Upon the death of their mother, Mrs. Virginia Lamar Bacon, it is my will that each of my said daughters Mary Louise and Augusta Lamar, shall receive annually, through said Trustees, from my estate at least the sum of $1,800.00. If the property set apart for the use and enjoyment of each of my said daughters upon the death of their mother, to be held as hereinbefore provided in trust for each of them during life, shall not in any year furnish an amount of net revenue sufficient to pay to each or either of them the full sum of $1,800.00, I direct that the deficiency be made up by sales of property so set apart; so that any deficiency in the annual amount due to my daughter Mary Louise shall be made up by sales of property set apart for her use; and in like manner any deficiency in the annual amount due to my daughter Augusta Lamar shall be made up by sales of property set apart for her use; and the property so sold shall, as hereinbefore provided, be thereby freed from said trusts and the estates, limitations and remainders thereunder. The purpose of this provision is not to limit my wife and daughters to the amount named, but to ensure to them at least said amounts in case the net revenues shall be insufficient for that purpose.

Item 9th

I direct that there by said Trustees laid off and accurately defined and permanently marked by enduring monuments, the following described part of my farm which is situated in part within and part without the corporate limits of the City of Macon, and known as "Baconfield," the same to be set apart and dedicated to the purposes, uses and enjoy-[fol. 28] ments as hereinafter more fully set forth and detailed. The said part of the property thus set apart is bounded as follows: there is on the Southeastern part of my said farm a four acre rectangular tract which formerly belonged to James Pepper, and which is commonly known as the "Pepper Place" the same having been purchased and added to my farm. For this description, beginning at the South-eastern corner of said rectangular tract, the boundary line of the property runs in a Northerly direction along the Eastern boundary line of said Pepper Place and thereafter in a direct prolongation of the same to a point nine hundred and sixty-three feet and five-tenths from the said starting point, thence in a slightly northwestern direction sixty-three feet and five-tenths, thence in a northerly direction three hundred and thirty-two feet across Boulevard Baconfield to a point on the Western side of said Boulevard, thence three hundred and sixteen feet along the western border of said Boulevard to a point on the same immediately opposite the junction of said Boulevard and Gray Street, thence, in a direction a little West of North, twenty-four hundred and eighty feet to an elm tree, thence at right angles sixteen hungred and sixty-two feet to the bank of the Ocmulgee River, thence in a Southeasterly direction along the bank of said river thirty-three hundred and ninety seven feet, thence in a direct line to the Southwest corner of the said Pepper lot, thence four hundred and thirty-seven feet along the Southern boundary line of said Pepper lot to the original starting point; the said metes and bounds of the said tract of land being correctly platted and defined on a map of the same hereto attached, made [fol. 29] by H. D. Cutter and upon which for the purpose of

identification, I have endorsed my original signature. The larger part of the property thus described and bounded is a portion of a trust estate originating with me and created solely by me for the benefit of my wife and children during my life and for their benefit and use after my death in such estates and with such remainders as should be specified and directed by me in my last Will and Testament. For the purpose of carrying out fully the purpose and intent of the trust thus created, I hereby give, bequeath and devise the said property consisting of the tract of land hereinbefore described and bounded and platted on said map unto the said Trustees, viz. Alexander Lawton Miller, Custis Nottingham, Richard C. Jordan and Warren Roberts, in trust for the sole joint use, benefit and enjoyment of my wife, Virginia Lamar Bacon, and of my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, during the term of their natural lives, as follows: So long as they shall all live they shall be entitled to the equal enjoyment and use of the same including all revenues and profits in any way derived therefrom. When Mrs. Virginia Lamar Bacon shall die, the use, benefit and enjoyment of the entire property herein described and bounded shall belong to my two said daughters equally, including all revenues and profits in any way derived from the same, during the full term of their natural lives. Upon the death of either of my said daughters, her interest in said property shall be enjoyed by her children and the survivors of them until the death of my last surviving daughter. Upon the death of my said wife and of each of my said daughters, [fol. 30] and of the last survivors of them, the trust created in this property by this said Ninth Item of this Will in the said tract of land thus defened, bounded and platted shall cease, and thereafter shall close all interest and right of enjoyment of any person or persons whomsoever in said property except as hereinafter specified and provided, to-wit: When my wife, Virginia Lamar Bacon and my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, shall all have departed this life, and immedi-

ately upon the death of the last survivor of them, it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided for: the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized. For the control, management, preservation and improvement of said property there shall be a Board of Managers consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons. [fol. 31] The Members of this Board shall first be selected and appointed by the Mayor and Council of the City of Macon, or by their successors in said trust; and all vacancies in said Board shall be filled by appointments made by the Mayor and Council of the City of Macon, or their successors, upon nomination made by the said Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors. If practicable, I desire that there shall be as a member of said Board of Managers at least one male or female descendant of my own blood, not only in the Board as first constituted, but at all times thereafter. The said Board of Managers shall at all times have complete and unrestricted control and management of the said property with power to make all needful regulations for the preservation and improvement of the same, and rules for the use and enjoyment thereof, with power to exclude at any time any person or persons of either sex,

who may be deemed objectionable, or whose conduct or character may by said Board be adjudged or considered objectionable, or such as to render for any reason in the judgment of said Board their presence in said grounds inconsisting with or prejudicial to the proper and most successful use and enjoyment of the same for the purposes herein contemplated. The Board of Managers shall have the power to admit to the use of the property the white men of the City of Macon, and white persons of other communities, with the right reserved to at any time withhold or withdraw such privilege in their discretion. To enable the Board of Managers to have a fund for the payment of necessary expenses connected with the management, improvement and preservation of said property, including when possible drives and walks, casinos and parlors for [fol. 32] women, play grounds for girls and boys and pleasure devices and conveniences and grounds for children, flower yards and other ornamental arrangements, I direct that said Board may use for purposes of income in any manner they may deem best that portion of the property that lies Easterly of the road known as Boulevard Baconsfield, beginning at the north Macon bridge and including the "Pepper Place," also all of said property lying on the river which is properly classed as low lands, or river bottom; but in no event and under no circumstances shall any part of the property herein conveyed and bounded and platted be ever sold or otherwise alienated or practically disposed of by any person or authority whatsoever, and excepting the portions of the property which may be used for purposes of revenue as aforesaid all the remainder of said property shall forever and in perpetuity be held for the sole uses, benefits and enjoyments as herein directed and specified. If it should be held that said property is subject to taxation when devoted to such uses as a park or pleasure ground, I request that proper steps be taken to secure from the State of Georgia a perpetual release from all liability to taxation.

I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.

I am, however, without hesitation in the opinion that in their social relations the two races (white and negro) [fol. 33] should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common. I am moved to make this bequest of said property for the use, benefit and enjoyment of the white persons herein specified, by my gratitude to and love of the people of the City of Macon from whom through a long life time I have received so much of personal kindness and so much of public honor; and especially as a memorial to my ever lamented and only sons, Lamar Bacon who died on the 21st day of December 1884 and Augustus Octavius Bacon, Jr. who died on the 27th day of the same year. And I conjure all of my descendants to the remotest generation as they shall honor my memory and respect my wishes to see to it that this property is cared for, protected and preserved forever for the uses and purposes herein indicated. I direct that said property during the lives of my said wife and my two said daughters shall continue to be known and designated as "Baconsfield" and that after their death, it shall be forever and perpetually known as "Baconsfield," and shall be so designated in all matters, documents and papers relating thereto.

While I make no restrictions, I request that the Managers will preserve on the property my present house residence, and the smaller house nearby which I have personally occupied for so many years and which I have called "The Hut" the said houses to be used to the best advantage, and in such localities on the property as may be most desirable, for the comfort, convenience and pleasure of the white women, girls, boys and children herein designated: and I trust that the managers of said property may find it to the best inter-

[fol. 34] est of those who are to enjoy this property that there shall be perpetually preserved the present woods and trees upon the same. And I specifically direct that during the said trust estate in said property for the uses and benefit of my wife Virginia Lamar Bacon and of my two daughters Mary Louise Bacon Sparks, and Augusta Lamar Bacon Curry, neither the said residence house nor the said smaller house known as "The Hut" shall be removed or destroyed or materially altered by addition or otherwise, but that the same during the entire terms of said trust estate for life, be carefully preserved in their present condition; and further that during the terms of said trust estates and during the lives of my said wife and my two said daughters, the woods and trees on said property be carefully preserved, and that no one of them be cut down or destroyed for any purpose whatsoever; and I further specifically provide and direct that the said trustees hereinbefore named and their successors shall not have power or authority to sell or otherwise alienate or dispose of the tract of land thus described, bounded and platted or any part thereof during the continuance of said trust or trusts or at any other time, under any circumstances and upon any account whatsoever, and all such power to make such sale or alienation is hereby expressly denied to them, and to all others.

Item 10th

To make still further provision for the preservation, management and improvement of the property set apart in the foregoing 9th Item of this Will as a park and pleasure grounds as aforesaid, I will and bequeath to the Mayor and Council of the City of Macon, and to their successors, ten [fol. 35] bonds of the Macon Railway and Light Co., each of said ten bonds being for $1000.00 and in the aggregate being for $10,000.00 and bearing interest at the rate of five per cent per annum, and at present in the custody of The Riggs National Bank in Washington, D. C., the said bonds and all monies or things of value resulting and derived therefrom to be held by the said Mayor and Council

of the City of Macon and their successors for the following trusts and uses, to-wit: So long as the property known and to be known perpetually as "Baconsfield," specified, bounded and described in the foregoing 9th Item of this Will, shall continue to be held in trust by the Trustees named in the said foregoing 9th Item and their successors for the use and benefit of my said wife and my two said daughters, or either of them, until the said property shall vest in the Mayor and Council of the City of Macon to be held in trust for the purposes specified and for the uses directed in the said 9th Item. The said Mayor and Council of the City of Macon shall as said Trustees collect the semi-annual interest which shall be paid on said bonds, and as promptly as practicable invest the same in interest bearing bonds to be added to and included in said trust fund; and the interest received on the additional bonds thus purchased, and from all other bonds additional thereto resulting from and accruing to said fund, shall in like manner be reinvesting in interest bearing bonds, so that all income from said fund or in any manner accruing to said fund shall as far as practicable be semiannually compounded and added to the principal of the original fund. When the said Trustees named in the said 9th Item and their successors shall cease [fol. 36] to hold said property in trust for my said wife and my said daughters, as provided in the said 9th Item, and when as therein provided the Mayor and Council of the City of Macon shall as Trustees be vested with said property and the title to the same for the uses therein set forth, they shall as may be required for the preservation, maintenance and improvement of said park and pleasure ground, pay over to the Board of Managers hereinbefore provided for, the income subsequently received from said trust fund constituted of and resulting from the said bonds; and all income derived from said property, and from said bonds, and the proceeds thereof, when not required for the needs of said park and pleasure ground, be added to the said principal fund, to the end that from increased income it may be in greater and ever increasong degree beautiful and developed and equipped for the benefit and enjoyment of those for

whose pleasure and happiness it is designated. If for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under the charter of the City to hold said fund in trust for the purposes specified, then unless said power is obtained through appropriate legislation, I direct that the powers herein expressed be conferred upon a trustee to be selected by the Mayor and Council of the City of Macon, with such safeguards and restrictions as may be prescribed by them for the perpetual safekeeping and management of the fund. And I give a similar direction if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their charter to hold in trust for the purposes specified the property designated for said [fol. 37] park and pleasure ground, unless said required power is conferred by appropriate legislation. Should the Mayor and Council of the City of Macon at any time consent to do so, then I direct that they be authorized to receive the fund constituted of said bonds and all additions thereto and the proceeds thereof, and cover the same into the treasury of the City, in consideration of the perpetual obligation of the City to be evidenced by its bond or otherwise, to provide and pay over annually to the said Board of Managers an amount equal to five per centum interest upon the sum thus covered into the treasury, to be devoted by said Board to the uses hereinbefore specified. In making this bequest as expressed in this and the preceding item of my Will, I have been mindful to preserve the full use and enjoyment of the real estate to my wife and daughters during their natural lives, and also of the fact that the entire bequest in value represents a very much smaller proportion of my estate than would have been the share in it of my two sons had they lived. As there will be no one of my descendants who now bears my name either by right or birth, or through voluntary choice, an additional reason is furnished why I should deem it proper that in devoting this property to the uses specified, I should at the same time link their memories with the pleasures and enjoyments of the women and children and girls and boys

of their own race in the community of which they once formed a happy part.

Item 11th

For many years I have had someone employed to care for the cemetery lot at Midway Church in Liberty County in [fol. 38] which my father, Rev. Augustus Octavius Bacon and my mother Mary Louise Bacon and my only brother, Samuel Jones Bacon, are buried, and also my uncle, Dr. Albert Summer Bacon, the small sum of $10.00 per year having been found sufficient for that purpose. I direct that the payment of said amount, or more if required, be made annually for said purpose, by the said trustees of my estate, and that the same be made a perpetual charge upon the property of my estate when distributed to my devisees and legatees; and I conjure my descendants to the remotest generation to so provide that the said cemetery lot shall always be properly preserved and cared for. I make a like bequest and request for the proper care of the burial lot of my wife's family in Rose Hill Cemetery in Macon, and for the proper care of my own cemetery lot in Macon.

Item 12th

The provision herein made for my wife, Mrs. Virginia Lamar Bacon, is in all its parts, both as to realty and personalty through said Trustees, intended to be in lieu of dower and first year's support. If she should refuse to accept the same and elect to take her dower, then it is my will that the remainder interest in the real estate set apart as her dower shall vest in my said Trustees for the trusts and estates and uses as hereinbefore provided should obtain following her death.

Item 13th

I direct that said Trustees shall be authorized to use a portion of the money realized from the sale of lots for residences or other purposes, in the improvement of other [fol. 39] portions of the property with the view of secur-

ing increased revenue therefrom for the enjoyment of my wife and daughters and their children; but I desire that this power shall be sparingly exercised and only in case where the prospects of such increased revenue is reasonable certain.

Item 14th

In case of the occurrence of a vacancy among the said Trustees herein named and appointed in the Sixth Item of this Will, I direct that it be filled by a suitable person selected by the remaining Trustees, such selection and the acceptance of the same to be evidenced in writing, and to be recorded upon the Minutes of the Superior Court of Bibb County upon petition by said remaining Trustees, and order of the Court granting authority to do so.

The said Trustees and their successors shall not be required to give any bond for the proper and faithful performance of their duties under said trust, or for any other purpose whatsoever, nor shall they be required to make any returns of property or of money received and disbursed, or of any other actings and doings under said trust to any court or other authority, but shall only be required to keep accurate books of accounts of property and of receipts and disbursements which shall be open to the inspection of the beneficiaries under this Will. They shall also make to the Mayor and Council of the City of Macon annual reports, relative to the conditions and preservation of the property herein designated as "Baconsfield" and embraced within the provisions of the Ninth Item of this Will, and particularly as to the preservation of the buildings and trees [fol. 40] upon the same. I have confidence that my said Trustees will execute this trust as economically as practicable, and I recognize and desire that such one of this number as may be charged more immediately with the work shall, through commissions or sales or otherwise, receive a fair compensation for his time and labor expended thereon.

Item 15th

I am firmly convinced both from observation and personal experience that it is unwise for personal relatives to have business transactions and business relations with each other, and I specifically direct that, except as provided in the ninth Item of this Will in the case of the said Board of Managers, no blood relation of myself, and more particularly no one related to me by marriage, and most particularly no present or any future husband of said daugters or of either of my granddaughters, either during the lives of my said daughters or granddaughters, or at any time thereafter, shall ever be either actually, nominally or practically or practically an executor, administrator or trustee for the management or control of my estate, or of any part of the property thereof, or hold any position, authority or employment as a manager, representative, or agent in the control or management of the property or any part thereof; or of any business or interest connected with the same or related thereto.

Item 16th

I hereby nominate, constitute and appoint my said long tried friends, Alexander Lawton Miller, Custis Nottingham, Richard C. Jordan and Warren Roberts, all of said State and County, Executors of this my Last Will and Testament. [fol. 41] They shall not be required to make any inventory or appraisement of the property of my estate, nor to have the same made by others, excepting only such as shall be made voluntarily by them to be entered on their private records for the information of themselves and of the beneficiaries under this Will. Nor shall the said Executors be required any bond, or to make any return of or concerning the property of my said estate, or the disposition or management of the same or of its revenues, or any other returns of any kind whatsoever to any court, officer or authority whatsoever.

In witness whereof I, the said Augustus Octavius Bacon, at Macon Georgia on this the twenty eighth day of March

in the year Nineteen hundred and eleven, to the foregoing thirty two pages written with my own hand, and containing my last Will and Testament, do hereby set my hand and affix my seal in the presence of the attesting witnesses, hereunto subscribing as such by my request.

/s/ Augustus Octavius Bacon (Seal)

Signed, Sealed, Declared and Published by Augustus Octavius Bacon as his last Will and Testament in the presence of the undersigned who, each of us, at his request, subscribed our names as witnesses thereto in the presence of said Testator and in the presence of each other—this the twenty eighth day of March, in the year Nineteen hundred and eleven; the words "including both that held by me in trust, and that held in fee simple," when they occur on the fourth page, and the word "authority," when it occurs on the tenth page, having been in each instance interlined before signing.

[fol. 42]

/s/ J. M. Hancock

/s/ Sidney W. Hatcher

/s/ Walter Defore

[fol. 43]

Exhibit "B" to Petition

CODICIL

City of Washington
District of Columbia

I, Augustus Octavius Bacon, of the State of Georgia and County of Bibb and now temporarily sojourning at Washington in the District of Columbia, being of sound and disposing mind and Memory, do hereby make, declare and publish this first codicil to my last Will and Testament heretofore made, published, and declared by me on the 28th day of March 1911.

Item 1st

I revoke so much of the second item of my said Will as directs that my body shall be interred in the cemetery lot recently purchased by me, and also that part in said item which directs that the bodies of my two deceased sons shall be disinterred and reinterred in said lot.

Item 2nd

I revoke so much of my said Will as nominates and appoints Warren Roberts as a trustee under the same, and also so much thereof as nominates and appoints the said Warren Roberts as Executor of my said Will, and in his stead I hereby nominate and appoint my tried and trusted friend Minter Wimberly of said County of Bibb, both as Trustee under my said Will and as executor thereof; hereby expressly conferring upon the said Minter Wimberly, both as said trustee and as said executor, all the powers, privi- [fol. 44] leges, rights, immunities and exemptions heretofore conferred in said Will upon the said Warren Roberts, both as Trustee and as Executor as aforesaid.

Item 3rd

My beloved daughter, Augusta Lamar Bacon Curry, having died, it is my Will and I hereby direct that her children, Shirley Holcomb Curry, Marie Louise Lamar Curry and Manly Lamar Bacon Curry, shall in the disposition of my property, stand in the place of their Mother, and that the interest in my estate which she would have taken under my said Will shall, upon my death, enure to them and be held in trust for them and each of them in the same manner and to the same extent and subject to the same trusts, limitations, conditions and remainders as they would have taken under the provisions of my said Will had my daughter Augusta survived me and had they upon her subsequent death taken the same remainder interests prescribed for them in my said Will, and my said trustees shall hold said interests for them with the same trusts, limitations and conditions as are prescribed for them in

my said Will; but subject nevertheless to the following additional provisions, limitations and remainders, to-wit: The interest as aforesaid of each of said children shall enure to and be enjoyed by each for and during the period of his or her natural life respectively; and if either of said children of my daughter Augusta shall die leaving no child or children in life, the interest of said child so dying shall [fol. 45] enure to and be injoyed by the surviving child or children of my daughter Augusta in the estates and with the same remainders as are herein prescribed for the original interest so received by each of them respectively. In making provisions for the children of my daughter Augusta I am not unmindful of the fact that part of the property thus generally devised is held by me in trust for my wife and children; but as the property thus held by me in trust is less than one-half of the aggregate of the property held by me both in trust and in my own right, the division herein directed thus generally, can be made without violation the terms of said trust. To prevent possibility of misconstruction I hereby prescribe and declare that all interest of the said children of my said daughter Augusta in the property specified in Item 9 of my said Will and in the rents, issues and profits thereof, shall cease, end and determine upon the death of my wife Virginia Lamar Bacon and of my daughter Mary Louise Bacon Sparks.

Item 4th

I direct that the said Custis Nottingham shall with his family continue to occupy free of rent the house now occupied by him at Baconsfield until the full experation and execution of the trusts for the preservation and execution of which I have in my said Will and in this Codicil appointed the said Alexander Lawton Miller, Custis Nottingham, R. C. Jordan and Minter Wimberly as Trustees as aforesaid; this provision being made in consideration of the personal interest in and care for said trust property and said cestui que trusts by said Nottingham.

[fol. 46] Item 5th

Except as herein modified and changed by this first Codicil, I do again hereby make, declare and publish my said last Will and Testament heretofore made, declared and published by me on the 28th day of March, 1911.

In witness whereof I, the said Augustus Octavius Bacon, at Washington in the District of Columbia on this the sixth day of September (1913) Nineteen hundred and thirteen to the foregoing four and one half pages written with my own hand and containing this first Codicil to my said last Will and Testament, do hereunto set my hand and affix my seal in the presence of the attesting witnesses hereunto subscribing as such at my request.

/s/ Augustus Octavius Bacon (Seal)

Signed, sealed, declared and published by Augustus Octavius Bacon as the first Codicil to his last Will and Testament in the presence of the undersigned, who each of us, at his request, have subscribed our names as witnesses thereto in the presence of the said Testator and in the presence of each other, this the Sixth day of September (1913) Nineteen hundred and thirteen.

/s/ Jno. T. Boifeuillet

/s/ James L. Fort

/s/ Earl B. Williams

[File endorsement omitted]

[fol. 47]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

Bill in Equity

No. 25864

[Title omitted]

ANSWER OF DEFENDANT, CITY OF MACON—
Filed May 20, 1963

Comes now the City of Macon, one of the defendants named in this action and files this answer to plaintiffs' petition, and shows:

1.

This defendant admits paragraphs one and two of plaintiff's petition.

2.

This defendant denies paragraph three of the petition, as pleaded, but admits that the defendant is a municipality duly created by the Legislature of the State of Georgia and that this defendant holds the legal and equitable title to the property in question, subject to the provisions of Item 1X of the last will and testament of Augustus Octavius Bacon.

3.

On information and belief, this defendant admits paragraph four of the petition.

4.

This defendant admits paragraphs five, six and seven of the petition.

5.

This defendant denies paragraph eight of the petition as pleaded. The said will attached to the petition speaks for

itself and is subject to interpretation and construction by this court.

[fol. 48]

6.

This defendant can neither admit nor deny paragraph nine of the petition, but, on information and belief, admits that subject property has been used exclusively by white persons.

7.

This defendant denies paragraph ten as pleaded. However, this defendant admits that large numbers of Negro citizens have gone upon the subject property and used the same for various recreational activities during the past few weeks, and the City of Macon further admits that the use of the subject property by said members of the Negro race is not in conformity with the expressed intentions of said testator as contained in Item 1X of the aforesaid will. Further, the City of Macon alleges that it has no authority to enforce racially discriminatory restrictions with regard to property held in fee simple or as trustee for a private or public trust and, as a matter of law, is prohibited from enforcing such racially discriminatory restrictions.

8.

This defendant admits the first sentence of paragraph eleven, but denies the remaining portion of said paragraph as pleaded.

9.

Defendant denies paragraph twelve of plaintiffs' petition.

10.

This defendant neither admits nor denies paragraph thirteen of plaintiffs' petition since no answer is required.

[fol. 49] For further plea and answer this defendant shows:

11.

The City of Macon cannot legally enforce racial segregation of the property known as Baconsfield and, therefore, is unable to comply with the specific intention of the said testator with regard to maintaining the property for the exclusive use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon; neither can the City convey said property to private individuals, either for or without consideration, in order to carry out the said specific intention of the said testator.

WHEREFORE:

This defendant prays that this honorable court construe the last will and testament of the late Augustus Octavius Bacon and enter a decree setting forth the duties and obligations of the City of Macon in the premises and give such directions as the court deems proper, just and equitable.

Buckner F. Melton, 305 Persons Building, Macon, Georgia, Attorney for Defendant, City of Macon.

Duly sworn to by Edgar H. Wilson, jurat omitted in printing.

[fol. 50] Certificate of service (omitted in printing).

[File endorsement omitted]

[fol. 51]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

Bill in Equity

No. 25864

[Title omitted]

ANSWER OF DEFENDANTS GUYTON G. ABNEY, J. D. CRUMP, T. I. DENMARK, AND DR. W. G. LEE, AS SUCCESSOR TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF AUGUSTUS OCTAVIUS BACON, DECEASED—Filed May 27, 1963

Come now Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee, as successor trustees under the Last Will and Testament of Augustus Octavius Bacon, deceased,

named among others as defendants in the above captioned matter, and answering said petition, respectfully show:

1.

These respondents admit the allegations of Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 of said petition.

2.

Further answering said petition, these respondents, without waiving any of the rights, title or interest vested in them under said Last Will and Testament, join in each and every prayer of said petition and, without limiting the generality of the foregoing, pray that the City of Macon be removed as trustee of the charitable trust created in said Last Will and Testament and Codicil of Augustus Octavius Bacon, deceased.

Jones, Sparks, Benton & Cork, Attorneys for respondents Guyton G. Abney, J. D. Crump, T. I. Den-
[fol. 52] mark and Dr. W. G. Lee, As successor Trustees under the Last Will and Testament of Augustus Octavius Bacon, deceased.

Duly sworn to by Guyton G. Abney, jurat omitted in printing.

[fol. 53] Certificate of service (omitted in printing).

[File endorsement omitted]

[fol. 54]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

Bill in Equity

No. 25864

[Title omitted]

MOTION FOR SUMMARY JUDGMENT—Filed May 27, 1963

Come now C. E. Newton, Frank M. Willingham, Mrs. Francis K. Hall, Mrs. Kenneth W. Dunwody, Mr. George P. Ranking, Jr., Mrs. Frederick W. Williams and Mrs. T. J.

Stewart, petitioners in the foregoing matter and make this motion for a summary judgment, and respectfully show:

1.

There is no genuine issue as to any material fact and your petitioners are entitled to a judgment as a matter of law.

Wherefore, your petitioners pray that this their motion for summary judgment be granted and that they have such other and further relief as the Court may deem fit and proper.

Jones, Sparks, Benton & Cork, Attorneys for petitioners.

Certificate of service (omitted in printing).

[fol. 55] [File endorsement omitted]

[fol. 56]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

Bill in Equity

No. 25864

[Title omitted]

MOTION OF REV. E. S. EVANS, ET AL. TO INTERVENE—
Filed May 29, 1963

Come now, Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, and move this Honorable Court for leave to file a petition of intervention in the above-styled action, and for grounds show as follows:

1.

That the property which is the subject matter of the captioned action is presently used as a public park in the City of Macon.

2.

The movants, being Negro residents of the City of Macon, and all other Negroes similarly situated, are subject to being irreparably harmed and damaged, in that, they are subject to being deprived of the use of said park if the prayers of the plaintiffs are sustained and a judgment is rendered in their favor.

3.

That the interests and welfare of the movants will be directly affected by the outcome of said suit, but there are no parties to the subject action who are or can adequately protect the legal rights and interests of the movants or the class which they represent, in that, some of the interests of the defendants and the movants are not only different but are, to some extent, adverse.

[fol. 57] 4.

Wherefore, movants pray that:

(a) This motion be allowed;

(b) That movants be granted leave to file their intervenors' petition in the above-captioned action;

(c) That all of the proceedings in the instant case be held in abeyance pending the filing of the intervenors' pleadings:

(d) That movants be granted thirty (30) days in which to file their pleadings in the captioned action.

This 26th day of May, 1963.

Donald L. Hollowell, Counsel for Movants.

859½ Hunter St., N. W., Atlanta 14, Georgia, Ja. 5-8372.

[fol. 58]

ORDER—May 28, 1963

Motion read and considered, let the same be filed.

It Is Hereby Ordered that the movants be, and they are granted leave to file their pleadings of intervention in the subject action within (20) Twenty days from the date of this order. All other proceedings in this action are hereby continued pending the filing of said pleadings within the time specified.

This 28 day of May, 1963.

O. L. Long, Judge, Bibb Superior Court.

[File endorsement omitted]

[fol. 59]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

Bill in Equity

No. 25864

[Title omitted]

INTERVENORS' PETITION—Filed June 18, 1963

Comes now, Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, who file this their intervention to the claim for relief of the plaintiffs, in their individual capacities and as they constitute the Board of Managers of Baconsfield, and show as follows:

1.

That the intervenors are Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, and are citizens of the United States of America and of the State of Georgia. Intervenors are domiciliaries and residents of Bibb County, Georgia, and of the City of Macon, Georgia. Each of the

intervenors is a member of the Negro race and bring this petition of intervention on behalf of themselves and other Negroes similarly situated as a class.

2.

That the present parties defendant, as named and designated in the petition, cannot adequately represent and assert the interest of the intervenors. For the intervenors seek to have Baconsfield Park operated upon an integrated basis and the present parties defendant have an interest in continuing to operate the said park upon a desegregated [fol. 60] basis according to Item 9 of the Will of Augustus Octavius Bacon which is attached to the plaintiffs' petition, marked "Exhibit 2", and thereby incorporated herein by reference.

3.

That any judgment, final order, or decree entered in the captioned action would be binding upon the intervenors and thus prejudicial to them.

4.

That by the Will of Augustus Octavius Bacon, the real property described in Item 9 became vested in the City of Macon in fee simple absolute upon the death of the testator and certain of his devisees and legatees under his will and codicil.

5.

That the Board of Managers charged by the Will with the obligation to control, maintain, and regulate Baconsfield Park is an agency of the City of Macon. Said Board of Managers having become such by the City of Macon having appointed and having designated its members from the date of creation of the park, until the present time, and by the City of Macon having adopted the Acts and Resolutions of said Board and by having acquiesced in the same.

6.

That the restriction and limitation reserving the use and enjoyment of the devise, legacy, and bequest of Baconsfield Park to the City of Macon to "White women, white girls, white boys and white children of the City of Macon," is violative of the public policy of the United States of America, treaties and other international obligations of the [fol. 61] United States and violative of the Constitution and laws of the State of Georgia. The public policy of the United States and of the State of Georgia being that no citizen is to be deprived of the use, benefit, and enjoyment of any publicly owned or supported facility solely because of his race, national origin, creed, or religion.

7.

That this Honorable Court, as an agency of the State of Georgia, cannot consistently with the equal protection clauses of the Fourteenth Amendment of the United States Constitution and the equivalent provisions of the Constitution of the State of Georgia, enter an order, as a court of equity, appointing three (3) freeholders, residents of the City of Macon, to serve as successor trustees, who in such capacity as trustees could operate and maintain Baconsfield Park upon a segregated basis; that is, the use and enjoyment of the same being limited and restricted to "white women, white girls, white boys and white children of the City of Macon." Such an order appointing private citizens as trustees for the manifest and express purpose of operating, managing, and regulating public property which passed to the City of Macon under a charitable trust created by will in a racially discriminatory manner, is violative of the Fourteenth Amendment to the United States Constitution and of the equivalent provisions of the Constitution of the State of Georgia.

[fol. 62] For a Second Answer and Defense

8.

That at the time the said will was probated and the real property known as Baconsfield Park passed to the City of Macon, the law of the land and of the State of Georgia as expressed and stated in the case of *Plessy* v. *Ferguson,* 163 U. S. 537, and decisions of the courts of this state and the laws of the State of Georgia consistent therewith permitted a racially restrictive condition and limitation imposed upon a public charitable trust to be enforced by the courts of the state wherein the trust was located. Since that time, the law of the land as reflected in the cases of *Brown* v. *Board of Education,* 347 U. S. 483, and the *Memphis Park Case* (decided in the United States Supreme Court May 27, 1963), and in decisions and judgments of the courts of this State and the laws consistent therewith, has changed. That is, discrimination based solely upon race is no longer a permissible object of state action whether such action is that of an administrative agency, the state executive officers and employees, the state legislature, or of the state courts.

9.

That, although the charitable legacy, device, and bequest at the time of its creation was capable of being executed in the exact manner provided for in the will of the testator, by operation of law it is no longer capable of further execution in the exact manner provided for by the testator, Augustus Octavius Bacon. That this Court (sitting in equity) effectuate the general charitable purpose of the testator to establish and endow a public park within the [fol. 63] City of Macon by refusing to appoint private persons as trustees of the said Baconsfield Park.

10.

That the plaintiffs as they appear by name and designation in the petition, are not proper parties to maintain a petition for the removal and appointment of trustees of a

public charitable trust as it does not appear that they have the requisite authority as required by law nor the requisite capacity and standing as required by law.

11.

That the plaintiffs, the named individuals and the Board of Managers do not come into this Court with clean hands. The plaintiffs seek judicial sanction of their alleged and avowed intent, design, and purpose to have private persons appointed in their place and stead as trustees, managers of Baconsfield Park, so that the said Baconsfield Park may be operated in violation and degradation of the constitutional rights of the intervenors.

Wherefore, the intervenors respectfully pray that they may have judgment against the petitioners with costs upon the petitioners.

Donald L. Hollowell, Horace T. Ward, Counsel for Intervenors.

Howard Moore, Jr., Of Counsel.

[fol. 64] June 14, 1963.

Certificates of service (omitted in printing).

[File endorsement omitted]

[fol. 65]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

AMENDMENT TO PLAINTIFFS' PETITION—
Filed January 8, 1964

Come now the plaintiffs in the above styled case and by leave of the Court first had and obtained, amend their petition as follows:

1.

By adding thereto a paragraph "14" to read as follows: "since the time when the original petition was filed, an intervention has been filed on behalf of certain negro residents of Macon, Bibb County, Georgia, to-wit: Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone. That intervention was filed on behalf of the above named parties and on behalf of 'other Negroes similarly situated' as a class".

2.

By adding thereto paragraph "15" to read as follows; "Plaintiffs show that by the phrase 'other Negroes similarly situated' the intervenors encompass all Negro residents of Macon, Bibb County, Georgia. Plaintiffs show that each and every one of the intervenors named in the above paragraph plus each and every member of the Negro race resident in Macon, Bibb County, Georgia, as the class represented should be permanently enjoined from entering the grounds of Baconsfield, using any of the facilities located thereon or in any other way interfering with plaintiffs in [fol. 66] their efforts to carry out the express testamentary wishes of A. O. Bacon relating to the classes of persons to be benefited by his grant of Baconsfield."

3.

By adding thereto a paragraph "16" to read as follows: "Plaintiffs show that a trust was established under the Will of A. O. Bacon for his heirs. The trust has been executed as regards four of his seven heirs now living and a distribution of property made to them. They are A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks. The interests of the remaining three heirs, i.e. Louise Curry Williams, Shirley Curry Cheatham, and Manley Lamar Curry, are still held under an unexecuted trust by four trustees holding under the authority of the will, to-wit: Guyton Abney, J. D. Crump, T. I. Den-

mark and Dr. W. G. Lee. Plaintiff shows that these seven persons have a definite interest in the disposition of this litigation, since if the trust purpose expressed in the Will of A. O. Bacon with respect to the designation of persons who may use Baconsfield, fails, the property comprising Baconsfield together with property, the rentals of which provide the upkeep of Baconsfield, will revert and lapse into the estate of A. O. Bacon thence to be distributed to the above named heirs."

4.

By adding thereto a paragraph "17" to read as follows: "Plaintiffs show that there are no parties to this case with an interest identical to that of the Sparks heirs of A. O. Bacon such as to afford adequate representation to [fol. 67] the interests of the said heirs."

5.

By adding thereto a prayer to read as follows: "Plaintiffs pray that A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks, and M. Garten Sparks be allowed to intervene and that Guyton Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee be allowed as Trustees to assert the interest of Louise Curry Williams, Shirley Curry Cheatham and Manley Lamar Curry."

6.

By adding thereto a prayer to read as follows: "Plaintiffs pray that each and every one of the intervenors named in paragraph one, plus each and every member of the Negro race resident in Macon, Bibb County, Georgia, as the class represented be permanently enjoined from entering the grounds of Baconsfield, using any of the facilities located thereon, or in any other way interfering with plaintiffs in their efforts to carry out the express testamentary wishes of A. O. Bacon relating to the classes of persons to be benefited by his grant of Baconsfield."

Wherefore, plaintiffs pray that their amendment be allowed.

Jones, Sparks, Benton & Cork, Attorneys for Plaintiffs.

ORDER—January 8, 1964

The within amendment being presented to me, it is allowed and ordered filed, subject to demurrer.
This the 8 day of January, 1964.

O. L. Long, J.S.C.M.C.

[fol. 68] Certificate of service (omitted in printing).

[File endorsement omitted]

[fol. 69]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

PETITION FOR INTERVENTION—Filed January 8, 1964

The petition of A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks, and M. Garten Sparks, respectfully shows to the court the following facts:

1.

Petitioners herein are grandchildren of the heirs of A. O. Bacon, deceased, being children of his deceased daughter, Mary Louise Bacon Sparks. The widow and only other child of the said A. O. Bacon who survived him are now deceased.

2.

Petitioners have an interest in the subject matter of the above styled case, since if the trust purpose expressed in

the Will of A. O. Bacon, including the restriction of the use of Baconsfield Park to white persons, is not carried out, the property will lapse into the Estate of A. O. Bacon, ultimately to be distributed to his heirs.

3.

Petitioners show that there is no party presently before the Court to represent their said interest.

4.

Petitioners present the following requests for relief praying that:

(a) They be allowed to intervene and be heard.

(b) That all of the prayers of plaintiffs, the Board of Managers of Baconsfield, be granted.

[fol. 70] (c) That each and all of the Negro intervenors and all of those whom they represent be permanently enjoined from entering Baconsfield Park or from in any way interfering with the Board's management of the Park for the use and benefit of white persons only.

5.

Further, petitioners emphasize beyond all chance for doubt that their desire is that the above enumerated prayers be granted, that the City of Macon be replaced as Trustee and that such other and further relief be granted by this Court as will insure that Baconsfield Park will continue to be operated in strict accordance with the Will of A. O. Bacon. It is the most fervent hope of intervenors that Baconsfield will remain as a memorial to the memory of the infant sons of A. O. Bacon and as a park for the benefit of the white boys, white girls and white women of Macon, Georgia, under the direction of the plaintiff Board of Managers.

6.

Petitioners further pray that if this Court does not enter an order in this case effectuating the continued administration of Baconsfield in accordance with the Will of A. O. Bacon for the sole benefit of white persons, That in that event,—And Only In That Event—this honorable Court decree that the trust purpose having failed, the property included in Baconsfield and that property, the rental of which had supplied the income for the upkeep of Baconsfield, both be held to revert and lapse into the estate by operation of law.

Jones, Sparks, Benton & Cork, Attorneys for Petitioners.

[fol. 71]

ORDER—January 8, 1964

The within petition for intervention being presented to me, it is allowed and ordered filed, subject to demurrer.

This the 8 day of January, 1964.

O. L. Long, J. S. C. M. C.

Certificate and acknowledgment of service (omitted in printing).

[File endorsement omitted]

[fol. 72]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

AMENDMENT TO ANSWER AND CROSS BILL—
Filed January 8, 1964

Come now Guyton Abney, J. D. Crump, T. I. Denmark, and Dr. W. G. Lee, defendants in the above styled case, and

by leave of the Court first had and obtained amend their answer as follows:

1.

By adding a paragraph 3 to read as follows: "These defendants are Trustees under the Will of A. O. Bacon for the benefit of certain of his heirs, to-wit: Louise Curry Williams, Shirley Curry Cheatham and Manley Lamar Curry. A similar trust has become executed with respect to certain other heirs, to-wit: A. O. B. Sparks, W. B. Sparks, Jr., Virginia Lamar Sparks, and M. Garten Sparks, but the trust with respect to the first named group of heirs, which shall hereinafter be referred to as the 'Curry Heirs', has not become executed."

2.

By adding a paragraph 4 to read as follows: "defendants show that the Curry Heirs have an interest in the subject matter of the above styled case, since if the trust purpose expressed in the Will of A. O. Bacon, including the restriction of the use of Baconsfield to white persons, is not carried out, the property will lapse into the Estate of A. O. Bacon, ultimately to be distributed to his heirs."

[fol. 73] 3.

By adding by way of a cross bill the following prayer: "Defendants as such Trustees and on behalf of the said Curry heirs present the following requests for relief praying:

(a) That they be allowed to assert the interest of the Curry heirs.

(b) That all of the prayers of plaintiffs, the Board of Managers of Baconsfield, be granted.

(c) That each and all of the Negro intervenors and all of those whom they represent be permanently enjoined from entering Baconsfield or from in any way inter-

fering with the Board's management of Baconsfield for the use and benefit of white persons only."

4.

By adding a paragraph to read as follows: "Further, defendants as such Trustees and on behalf of the Curry heirs emphasize beyond all chance for doubt that the desire of the Curry heirs is that the above enumerated prayers be granted, that the City of Macon be replaced as Trustee and that such other and further relief be granted by this Court as will insure that Baconsfield will continue to be operated in strict accordance with the Will of A. O. Bacon. It is the most fervent hope of the Curry heirs that Baconsfield will remain as a memorial to the memory of the infant sons of A. O. Bacon and as a park for the benefit of the white boys, white girls and white women of Macon, Georgia, under the direction of the plaintiff Board of Managers."

[fol. 74] 5.

By adding by way of cross bill the following prayer: "Defendants as such Trustees and on behalf of the Curry heirs further pray that if this Court does not enter an order in this case effectuating the continued administration of Baconsfield in accordance with the Will of A. O. Bacon for the sole benefit of white persons, that in that event,—And Only In That Event—this honorable Court decree that the trust purpose having failed, the property included in Baconsfield and that property, the rental of which had supplied the income for the upkeep of Baconsfield, both be held to revert and lapse into the estate by operation of law."

Jones, Sparks, Benton & Cork, Attorneys for the aforementioned Trustees.

ORDER—January 8, 1964

The within Amendment to Answer and Cross Bill being presented to me, it is allowed and ordered filed, subject to demurrer.

This the 8 day of January, 1964.

O. L. Long, J.S.C.M.C.

[fol. 75] Certificate and acknowledgment of service (omitted in printing).

[File endorsement omitted]

[fol. 76]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

AMENDMENT TO ANSWER OF CITY OF MACON—
Filed February 5, 1964

Comes now the City of Macon, defendant in the above stated case, and by leave of the Court first had and obtained amends its answer heretofore filed and respectfully shows:

1.

Pursuant to a resolution adopted by the Mayor and Council of the City of Macon at its regular meeting on February 4, 1964, a copy of which is hereto attached marked Exhibit A, the City of Macon acting through its Mayor and Clerk has resigned as Trustee under Items 9th and 10th of the Will of the late Senator Augustus Octavius Bacon, a copy of said resignation being hereto attached marked Exhibit B.

2.

Upon the acceptance of said resignation by this Court and the appointment of new Trustees to serve in lieu of the City of Macon, if this Court sees fit to appoint such new Trustees, the City of Macon will have no further duties to perform as such Trustee and will no longer be a necessary or proper party in said case.

Wherefore, defendant prays:

(1) That this amendment be allowed and ordered filed as part of the record in said case;

[fol. 77] (2) That the resignation of the City of Macon as Trustee under the Will of Senator Augustus Octavius Bacon be accepted, and that the Court take such further action in the premises as to the Court may seem meet and proper;

(3) That defendant be hence discharged.

Trammell F. Shi, City Attorney.

ORDER

The foregoing amendment allowed and ordered filed.

This February 5, 1964.

O. L. Long, J.S.C.M.C.

Certificates of service (omitted in printing).

[fol. 79]

EXHIBIT "A" TO AMENDMENT TO ANSWER

RESOLUTION OF THE MAYOR AND COUNCIL OF THE CITY OF MACON ADOPTED FEBRUARY 4, 1964

WHEREAS, in Civil Action No. 25864, pending in the Superior Court of Bibb County, Georgia, captioned *Charles E. Newton, et al.* vs. *City of Macon, et al.* the defendant City of Macon has heretofore filed its answer admitting that it has not for some time prior to filing said answer carried out as Trustee all of the provisions of the trust established in Items 9th and 10th of the Last Will and Testament of the Late Senator Augustus Octavius Bacon with reference to the property known as Baconsfield, said Items 9th and 10th reading as follows:

"Item 9th

"I direct that there by said Trustees laid off and accurately defined and permanently marked by enduring

monuments, the following described part of my farm which is situated in part within and part without the corporate limits of the City of Macon, and known as 'Baconsfield,' the same to be set a part and dedicated to the purposes, uses and enjoyments as hereinafter more fully set forth and detailed. The said part of the property thus set apart is bounded as follows: There is on the Southeastern part of my said farm a four acre rectangular tract which formerly belonged to James Pepper, and which is commonly known as the 'Pepper Place' the same having been purchased and added to my farm, for this description, beginning at [fol. 80] the Southeastern corner of said rectangular tract, the boundary line of the property runs in a Northerly direction along the Eastern boundary line of said Pepper Place and thereafter in a direct prolongation of the same to a point nine hundred and sixty-three feet and five-tenths from the said starting point, thence in a slightly northwestern direction sixty-three feet and five-tenths, thence in a northerly direction three hundred and thirty-two feet across boulevard Baconfield to a point on the Western side of said Boulevard, thence three hundred and sixteen feet along the western border of said Boulevard to a point on the same immediately opposite the junction of said Boulevard and Gray Street, thence, in a direction a little West of North, twenty-four hundred and eighty feet to an elm tree, thence at right angles sixteen hundred and sixty-two feet to the bank of the Ocmulgee River, thence in a Southeasterly direction along the bank of said river thirty-three hundred and ninety-seven feet, thence in a direct line to the Southwest corner of the said Pepper lot, thence four hundred and thirty-seven feet along the Southern boundary line of said Pepper lot to the original starting point; the said metes and bounds of the said tract of land being correctly platted and defined on a map of the same hereto attached, made by H. D. Cutter and upon which for the purpose of identification, I have endorsed my original signa-

[fol. 81] ture. The larger part of the property thus described and bounded is a portion of a trust estate originating with me and created solely by me for the benefit of my wife and children during my life and for their benefit and use after my death in such estates and with such remainders as should be specified and directed by me in my last Will and Testament. For the purpose of carrying out fully the purpose and intent of the trust thus created, I hereby give, bequeath and devise the said property consisting of the tract of land hereinbefore described and bounded and platted on said map unto the said Trustees, viz. Alexander Lawton Miller, Custis Nottingham, Richard C. Jordan and Warren Roberts, in trust for the sole joint use, benefit and enjoyment of my wife, Virginia Lamar Bacon, and of my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, during the term of their natural lives, as follows: So long as they shall all live they shall be entitled to the equal enjoyment and use of the same including all revenues and profits in any way derived therefrom. When Mrs. Virginia Lamar Bacon shall die, the use, benefit and enjoyment of the entire property herein described and bounded shall belong to my two said daughters equally, including all revenues and profits in any way derived from the same, during the full term of their natural lives. Upon the death of either of my said daughters, [fol. 82] her interest in said property shall be enjoyed by her children and the survivors of them until the death of my last surviving daughter. Upon the death of my said wife and of each of my said daughters, and of the last survivors of them, the trust created in this property by this said Ninth Item of this Will in the said tract of land thus defined, bounded and platted shall crase, and thereafter shall close all interest and right of enjoyment of any person or persons whomsoever in said property except as hereinafter specified and provided, to-wit: When my wife, Virginia Lamar Bacon and my two daughters, Mary Louise Bacon

Sparks and Augusta Lamar Bacon Curry, shall all have departed this life, and immediately upon the death of the last survivor of them, it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers [fol. 83] hereinafter provided for; the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized. for the control, management, preservation and improvement of said property there shall be a Board of Managers consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons. The Members of this Board shall first be selected and appointed by the Mayor and Council of the City of Macon, or by their successors in said trust; and all vacancies in said Board shall be filled by appointments made by the Mayor and Council of the City of Macon, or their successors, upon nomination made by the said Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors. If practicable, I desire that there shall be as a member of said Board of Managers at least one male or female descendant of my own blood, not only in the Board as at first constituted, but at all times thereafter. The said Board of Managers shall at all times have complete and unrestricted control and management of the said property, with power to make all

needful regulations for the preservation and improvement of the same, and rules for the use and enjoyment thereof, with power to exclude at any time any person [fol. 84] or persons of either sex, who may be deemed objectionable, or whose conduct or character may by said Board be adjudged or considered objectionable, or such as to render for any reason in the judgment of said Board their presence in said grounds inconsisting with or prejudicial to the proper and most successful use and enjoyment of the same for the purposes herein contemplated. The Board of Managers shall have the poser to admit to the use of the property the white men of the City of Macon, and white persons of other communities, with the right reserved to at any time withhold or withdraw such privilege in their discretion. To enable the Board of Managers to have a fund for the payment of necessary expenses connected with the management, improvement and preservation of said property, including when possible drives and walks, casinos and parlors for women, play grounds for girls and boys and pleasure devices and conveniences and grounds for children, flower yards and other ornamental arrangements, I direct that said Board may use for purposes of income in any manner they may deem best that portion of the property that lies Easterly of the road known as Boulevard Baconsfield, beginning at the north Macon bridge and including the 'Pepper Place,' also all of said property lying on the river which is property classed as low lands, or river bottom; but in no event and under no circumstances shall any part of the property herein conveyed and bounded and [fol. 85] platted be ever sold or otherwise alienated or practically disposed of by any person or authority whatsoever, and excepting the portions of the property which may be used for purposes of revenue as aforesaid all the remainder of said property shall forever and in perpetuity be held for the sole uses, benefits and enjoyments as herein directed and specified. If it should be held that said property is subject to

taxation when devoted to such uses as a park or pleasure ground, I request that proper steps be taken to secure from the State of Georgia a perpetual release from all liability to taxation.

"I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.

"I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common. I am moved to make this bequest of said property for the use, benefits and enjoyment of the white persons herein specified, by my gratitude to [fol. 86] and love of the people of the City of Macon from whom through a long life time I have received so much of personal kindness and so much of public honor; and especially as a memorial to my ever lamented and only sons, Lamar Bacon who died on the 21st day of December 1884 and Augustus Octavius Bacon, Jr. who died on the 27th day of the same year. And I conjure all of my descendants to the remotest generation as they shall honor my memory and respect my wishes to see to it that this property is cared for, protected and preserved forever for the uses and purposes herein indicated. I direct that said property during the lives of my said wife and my two said daughters shall continue to be known and designated as 'Baconsfield' and that after their death, it shall be forever and perpetually known as 'Baconsfield,' and shall be so designated in all matters, documents and papers relating thereto.

"While I make no restrictions, I request that the Managers will preserve on the property my present house residence, and the smaller house nearby which I

have personally occupied for so many years and which I have called 'The Hut' the said houses to be used to the best advantage, and in such localities on the property as may be most desirable, for the comfort, convenience and pleasure of the white women, girls, boys and children herein designated: and I trust that the [fol. 87] managers of said property may find it to the best interest of those who are to enjoy this property that there shall be perpetually preserved the present woods and trees upon the same. And I specifically direct that during the said trust estate in said property for the uses and benefit of my wife Virginia Lamar Bacon and of my two daughters Mary Louise Bacon Sparks, and Augusta Lamar Bacon Curry, neither the said residence house nor the said smaller house known as 'The Hut' shall be removed or destroyed or materially altered by addition or otherwise, but that the same during the entire terms of said trust estate for life, be carefully preserved in their present condition; and further that during the terms of said trust estates and during the lives of my said wife and my two said daughters, the woods and trees on said property be carefully preserved, and that on one of them be cut down or destroyed for any purpose whatsoever; and I further specifically provide and direct that the said trustees hereinbefore named and their successors shall not have power or authority to sell or otherwise alienate or dispose of the tract of land thus described, bounded and platted or any part thereof during the continuance of said trust or trusts or at any other time, under any circumstances and upon any account whatsoever, and all such power to make such sale or alienation is hereby hereby expressly denied to them, and to all others."

[fol. 88] "Item 10th

"To make still further provision for the preservation, management and improvement of the property set apart in the foregoing 9th Item of this Will as a park and pleasure grounds as aforesaid, I will and be-

queath to the Mayor and Council of the City of Macon, and to their successors, ten bonds of the Macon Railway and Light Co., each of said ten bonds being for $1000.00 and in the aggregate being for $10,000.00 and bearing interest at the rate of five per centum per annum, and at present in the custody of the The Riggs National Bank in Washington, D. C., the said bonds and all monies or things of value resulting and derived therefrom to be held by the said Mayor and Council of the City of Macon and their successors for the following trusts and uses, to-wit: So long as the property known and to be known perpetually as 'Baconsfield,' specified, bounded and described in the foregoing 9th Item of this Will, shall continue to be held in trust by the Trustees named in the said foregoing 9th Item and their successors for the use and beiefit of my said wife and my two said daughters, or either of them, until the said property shall vest in the Mayor and Council of the City of Macon to be held in trust for the purposes specified and for the uses directed in the said 9th Item. The said Mayor and Council of the City of Macon shall as said Trustees collect the semi- [fol. 89] annual interest which shall be paid on said bonds, and as promptly as practicable invest the same in interest bearing bonds to be added to and included in said trust fund; and the interest received on the additional bonds thus purchased, and from all other bonds additional thereto resulting from and accruing to said fund, shall in like manner be reinvesting in interest bearing bonds, so that all income from said fund or in any manner accuring to said fund shall as far as practicable be semi-annually compounded and added to the principal of the original fund. When the said 9th Item and their cussessors shall cease to hold said property in trust for my said wife and my said daughters, as provided in the said 9th Item, and when as therein provided, the Mayor and Council of the City of Macon shall as Trustees be vested with said property and the title to the same for the uses therein set

forth, they shall as may be required for the preservation, maintenance and improvement of said park and pleasure ground, pay over to the Board of Managers hereinbefore provided for, the income subsequently received from said trust fund constituted of and resulting from the said bonds; and all income derived from said property, and from said bonds, and the proceeds thereof, when not required for the needs of said park and pleasure ground, be added to the said principal fund, to the end that from increased income it may be in greater and ever increasing degree beauti- [fol. 90] ful and developed and equipped for the benefit and enjoyment of those for whose pleasure and happiness it is designated. If for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under the charter of the City to hold said fund in trust for the purposes specified, then unless said power is obtained through appropriate legislation, I direct that the powers herein expressed be conferred upon a trustee to be selected by the Mayor and Council of the City of Macon, with such safeguards and restrictions as may be prescribed by them for the perpetual safekeeping and management of the fund. And I give a similar direction if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their charter to hold in trust for the purposes specified the property designated for said park and pleasure ground, unless said required power is conferred by appropriate legislation. Should the Mayor and Council of the City of Macon at any time consent to do so, then I direct that they be authorized to receive the fund constituted of said bonds and all additions thereto and the proceeds thereof, and cover the same into the treasury of the City, in consideration of the perpetual obligation of the City to be evidenced by its bond or otherwise, to provide and pay over annually to the said Board of Managers an amount equal to five per centum interest [fol. 91] upon the sum thus covered into the treasury,

to be devoted by said Board to the uses hereinbefore specified. In making this bequest as expressed in this and the preceding item of my Will, I have been mindful to preserve the full use and enjoyment of the real estate to my wife and daughters during their natural lives, and also of the fact that the entire bequest in value represents a very much smaller proportion of my estate than would have been the share in it of my two sons had they lived. As there will be no one of my descendants who now bears my name by right of birth, or through voluntary choice, an additional reason is furnished why I should deem it proper that in devoting this property to the uses specified, I should at the same time link their memories with the pleasures and enjoyments of the women and children and girls and boys of their own race in the community of which they once formed a happy part."

and,

WHEREAS, under certain decisions of the Federal courts the City of Macon has realized that it could not as a numicipal corporation carry out all of said provisions; and

WHEREAS, the Mayor and Council deem it to be in the public interest that Baconsfield be operated and maintained for the benefit of the public rather than for private benefit or profit; and

WHEREAS, the Mayor and Council are greatly concerned [fol. 92] that if Baconsfield is not operated and maintained in accordance with all of the provisions of the Will of Senator Bacon, the property may revert to private persons who are heirs at law of or legatees under the Will of Senator Bacon, in which case Baconsfield would become commercial or residential property or property of a nature wherein no part of the public would have the enjoyment of the property contemplated by Senator Bacon; and

WHEREAS, the City is advised that the income producing property which the late Senator Bacon bequeathed in trust for the purpose of maintaining Baconsfield is sufficient for

that purpose and that if the Court decides to appoint new Trustees the park may be economically maintained by the Trustees in accordance with the expressed intentions of the late Senator Bacon, and at no cost to the City in connection with such operations and maintenance; and

WHEREAS, it is the considered opinion of the Mayor and Council that it is against good conscience for the City of Macon to continue to serve as Trustee under said Will under circumstances where as such Trustee it cannot carry out the plain and unambiguous terms of the trust; and

WHEREAS, in the light of the foregoing it is the considered opinion of the Mayor and Council that the City of Macon should forthwith resign as Trustee under the Will of Senator Bacon;

NOW, THEREFORE, be it resolved by the Mayor and Council of the City of Macon, and it is hereby resolved, that the City of Macon forthwith resign as Trustee under the trust established in Items 9th and 10th of the Will of the late Senator Augustus Octavius Bacon.

[fol. 93] RESOLVED FURTHER, that the Mayor and the Clerk of Council be authorized to sign in the name of the City of Macon a written resignation of such trust and deliver the same to Mr. Trammell F. Shi, City Attorney, with instructions to him to deliver it to the Superior Court of Bibb County, Georgia, in the litigation now pending instituted by the Board of Managers of Baconsfield, created in said Will, against the City of Macon and others.

[fol. 94]

EXHIBIT "B" TO AMENDMENT TO ANSWER

RESIGNATION OF THE CITY OF MACON AS TRUSTEE UNDER WILL OF SENATOR AUGUSTUS OCTAVIUS BACON

Pursuant to a resolution adopted on the 4th day of of February, 1964, by Mayor and City Council of the City of Macon, the City of Macon hereby resigns as Trustee of the property known as Baconsfield under the trust estab-

lished in Items 9th and 10th of the Will of the late Senator Augustus Octavius Bacon.

IN WITNESS WHEREOF, as directed in the aforesaid resolution, the City of Macon has caused these presents to be executed by the Mayor and the Clerk of Council and its seal affixed, this the 4th day of February, 1964.

THE CITY OF MACON

By B. F. Merritt, Jr.
Mayor of the City of Macon

Attest: Alex B. Cameron
Clerk of Council
City of Macon

(Seal of the City of Macon)

[File endorsement omitted]

[fol. 95]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

AMENDMENT TO INTERVENORS' PETITION—
Filed March 5, 1964

Comes now, the intervenors in the above-styled case, Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, and by leave of Court first had and obtained, amend their petition by adding thereto four additional paragraphs to be known as paragraphs 12, 13, 14, and 15, and a prayer, as follows:

12.

That the equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits this Court from enjoining Negroes from use of the park.

13.

That the equal protection clause of the Fourteenth Amendment prohibits this Court from accepting the resignation of the City of Macon as trustee and appointing new trustees for the purpose of enjoining the racially discriminatory provision in the will of A. O. Bacon.

14.

That Georgia Code Annotated, Section 69-504 prescribes racial discrimination and is therefore violative of the equal [fol. 96] protection clause to the Fourteenth Amendment. Since the racially discriminatory provision in A. O. Bacon's will was dictated by that unconstitutional statute, enforcement of the racially discriminatory provision is constitutionally prohibited.

15.

Georgia Code Annotated, Section 108-202, properly construed, requires that the racially discriminatory provision in A. O. Bacon's will be declared null and void.

Wherefore, the intervenors respectfully pray that this Court withhold approval of the attempted resignation of the City of Macon as trustee under the will of A. O. Bacon, direct the City of Macon to continue to fulfill this paramount constitutional obligation to administer the park on a racially non-discriminatory basis, and deny the injunction sought by plaintiffs to exclude Negroes from use of the park.

Wherefore, the intervenors pray that this amendment be allowed.

Donald L. Hollowell, 859½ Hunter St., N. W., Atlanta, Georgia 30314, Attorney For Intervenors.

William H. Alexander, Of Counsel For Intervenors.

[fol. 97]

ORDER—March 5, 1964

The foregoing amendment read and considered,

It Is Ordered that the same be filed, subject to objections.

This 5 day of March, 1964.

O. L. Long, Judge, Superior Court, Macon Judicial Circuit.

[File endorsement omitted]

Certificate of Service (omitted in printing).

[fol. 99]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

CHARLES E. NEWTON, ET AL.,

v.

CITY OF MACON, ET AL.

ORDER AND DECREE—March 10, 1964

The Motion for Summary Judgment filed in behalf of petitioners in the above captioned matter having come on regularly to be heard, and the Court having duly considered all pleadings filed in behalf of all parties to said cause and the briefs filed in behalf of petitioners and the intervenors Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, it is

Considered, Ordered and Adjudged as follows:

(1) The intervenors named above are proper parties to this case and are proper representatives of the class

which their intervention states they represent, to-wit, the negro citizens of Bibb County, Georgia, and the City of Macon, Georgia.

(2) The defendants Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee, as successor Trustees under the Last Will and Testament of Augustus Octavius Bacon, deceased, are also proper parties to the case, as are the intervenors A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks.

(3) The defendant the City of Macon having submitted its resignation as Trustee of the property described in the petition and known as Baconsfield, said resignation is here-[fol. 100] by accepted by the Court.

(4) Under the principle that a trust shall not fail for want of a trustee it becomes the duty of this Court to appoint new trustees to serve in lieu of the City of Macon; and the following, all being citizens and residents of Bibb County, Georgia, are hereby appointed as Trustees, to-wit, Hugh M. Comer, Lawton Miller and B. L. Register.

(5) The Court hereby retains jurisdiction for the purpose of appointing another trustee or trustees in the event any of the persons named above fails to accept his appointment or in the event of the future death, incompetency or other cause whereby any or all of such Trustees fail or cease to act as such.

(6) Since the relief herein granted is also that primarily sought by the defendants Guyton G. Abney, et al., as Trustees under the Last Will and Testament of Augustus Octavius Bacon and by intervenors A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks, it is therefore unnecessary to pass upon and the Court does not pass upon the secondary contentions outlined in paragraph 5 of the amendment to the answer and cross bill filed by Guyton G. Abney, et al., as Trustees and in paragraph 6 of the petition for intervention filed by the above named intervening heirs.

So Ordered, this the 10 day of March, 1964.

O. L. Long, J.S.C.M.C.

[File endorsement omitted]

[fol. 101]

ATTACHMENT TO ORDER

RESIGNATION OF THE CITY OF MACON AS TRUSTEE UNDER WILL OF SENATOR AUGUSTUS OCTAVIUS BACON

Pursuant to a resolution adopted on the 4th day of February, 1964, by Mayor and City Council of the City of Macon, the City of Macon hereby resigns as Trustee of the property known as Baconsfield under the trust established in Items 9th and 10th of the Will of the late Senator Augustus Octavius Bacon.

IN WITNESS WHEREOF, as directed in the aforesaid resolution, the City of Macon has caused these presents to be executed by the Mayor and the Clerk of Council and its seal affixed, this the 4th day of February, 1964.

THE CITY OF MACON

By B. F. Merritt, Jr.
Mayor of the City of Macon

Attest: Alex B. Cameron
Clerk of Council
City of Macon

(Seal of the City of Macon)

FILED IN OFFICE
5 day of Feb. 1964
Era B. Goodner
Deputy Clerk

[fol. 102]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

ACCEPTANCE OF TRUST—Filed March 12, 1964

Come now the undersigned, Hugh M. Comer, Lawton Miller and B. L. Register, and pursuant to the Order and Decree of Honorable O. L. Long, Judge, Superior Courts, Macon Circuit, dated March 10, 1964, hereby formally accept their appointment as successor Trustees under Items IX and X of the Last Will and Testament of Augustus Octavius Bacon, Deceased.

This 11th day of March, 1964.

Hugh M. Comer, Lawton Miller, B. L. Register.

[File endorsement omitted]

[fol. 103] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 105]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

REV. E. S. EVANS, et al., Plaintiffs-in-error,

—VS.—

CHARLES E. NEWTON, et al., Defendants-in-error.

MOTION TO AMEND BILL OF EXCEPTIONS—
Filed May 8, 1964

To the Honorable Chief Justice and the Honorable Justices of the Supreme Court of Georgia:

Comes now the plaintiffs-in-error, Rev. E. S. Evans, et al. in the above-styled case which is before this Honor-

able Court by virtue of being an equity action from the Superior Court of Bibb County, who with leave of Court, and pursuant to Georgia Code Annotated, Sections 6-913, 6-1309, 6-1401, and 81-1301, amend page one (1) of their bill of exceptions by striking the designation of plaintiffs-in-error and defendants-in-error, respectively, and substituting therefor the following:

Rev. E. S. Evans, Louis H. Wynn, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, Plaintiffs-in-error,

—vs.—

The City of Macon; A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks, M. Barton Sparks, Heirs at law of A. O. Bacon; Guyton Adley, J. D. Crump, J. J. Denmark, Dr. W. G. Lee, Successor Trustees under the Will of A. O. Bacon; Hugh M. [fol. 106] Comer, Lawton Miller, and B. L. Register, Successor Trustees in lieu of the City of Macon, Defendants-in-error.

Wherefore, plaintiffs-in-error pray that this their amendment be allowed.

Donald L. Hollowell, William H. Alexander, Attorneys for Plaintiffs-in-Error.

[fol. 107] Certificate of Service (omitted in printing).

[fol. 108]

ORDER

The foregoing Amendment having been read and considered, the same is allowed and ordered filed.

....., Justice, Supreme Court of Georgia.

[fol. 109] [File endorsement omitted]

[fol. 110]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

[Title omitted]

SECOND MOTION TO AMEND BILL OF EXCEPTIONS—
Filed May 18, 1964

To the Honorable Chief Justice and the Honorable Justices of the Supreme Court of Georgia:

Comes now the plaintiffs-in-error, Rev. E. S. Evans, et al. in the above-styled case which is before this Honorable Court by virtue of being an equity action from the Superior Court of Bibb County, who with leave of Court, and pursuant to Georgia Code Annotated, Sections 6-913, 6-1309, 6-1401, and 81-1301, amend page one (1) of their bill of exceptions by striking the designation of plaintiffs-in-error and defendants-in-error, respectively, and substituting therefor the following:

Rev. E. S. Evans, Louis H. Wynn, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, Plaintiffs-in-error,

—vs.—

The City of Macon; A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks, M. Barton Sparks, Heirs at law of A. O. Bacon; Guyton Adley, J. D. Crump, J. J. Denmark, Dr. W. G. Lee, Successor Trustees under the Will of A. O. Bacon; Charles [fol. 111] Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, George P. Rankin, Jr., Mrs. Frederic W. Williams, and Mrs. Kenneth Dunwoody, Members of the Board of Managers under will of A. O. Bacon; Hugh M. Comer, Lawton Miller, and B. L. Register, Successor Trustees in lieu of the City of Macon, Defendants-in-error.

Wherefore, plaintiffs-in-error pray that this their amendment be allowed.

D. L. Hollowell, William H. Alexander, Attorneys for Plaintiffs-in-Error.

[fol. 112] Certificate of Service (omitted in printing).

[fol. 113]

ORDER

The foregoing Amendment having been read and considered, the same is allowed and ordered filed.

....., Justice, Supreme Court of Georgia.

[fol. 114] [File endorsement omitted]

[fol. 115]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

[Title omitted]

MOTION OF CHARLES E. NEWTON, ET AL. TO SUBSTITUTE PARTIES DEFENDANT-IN-ERROR—Filed May 27, 1964

To the Honorable Chief Justice and the Honorable Justices of the Supreme Court of Georgia:

Come now the defendants-in-error, Charles E. Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, George P. Rankin, Jr., Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody and for reasons which will hereinafter appear, pray that this Honorable Court substitute as parties defendant-in-error in place of Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody the four following named residents of Macon, Bibb County, Georgia:

A. M. Anderson
Mrs. Dan O'Callaghan
Mrs. R. A. McCord, Jr.
Mrs. W. E. Pendleton, Jr.

In support of this motion the movants respectfully show to this Court the following facts. After the Trial Court entered its order on March 10, 1964, appointing Hugh Comer, Lawton Miller and B. L. Register as Trustees of Baconsfield, movants herein tendered to these three new Trustees their resignations as members of the Board of Managers of Baconsfield. This joint resignation was sub-
[fol. 116] mitted to the Trustees on March 18, 1964.

Thereafter, on May 21, 1964, at a time when the record from the Trial Court had already been docketed in the Supreme Court of Georgia, a meeting was held at which the above named three Trustees formally accepted the resignations previously tendered to them and appointed a new Board of Managers to consist of the following persons:

A. M. Anderson
Mrs. Francis K. Hall
Mrs. R. A. McCord, Jr.
Mrs. Dan O'Callaghan
Mrs. W. E. Pendleton, Jr.
George P. Rankin, Jr.
Frank M. Willingham

These seven appointees thereupon accepted their appointments in writing.

A copy of the resignation of the members of the former Board of Managers is attached hereto as Exhibit "A". The acceptance of this resignation and the appointment of a new Board by the three Trustees and the acceptance of this appointment by the new Board of Managers is attached hereto as Exhibit "B". Movants hereby incorporate these two exhibits by reference.

Four of the seven positions on the Board of Managers are now filled by persons who did not serve on the Board as it was constituted at the time this case was docketed in

the Supreme Court of Georgia, and who have never served on the Board before.

Wherefore, movants pray that A. M. Anderson, Mrs. R. A. McCord, Jr., Mrs. Dan O'Callaghan and Mrs. W. E. [fol. 117] Pendleton, Jr. may be made parties defendant-in-error and that Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody may be stricken as parties defendant-in-error.

Jones, Sparks, Benton & Cork, Attorneys for Defendants-in-Error, Board of Managers of Baconsfield.

Address of Counsel:

1007 Persons Building, Macon, Georgia, SHerwood 5-2821.

[fol. 118]

GEORGIA, BIBB COUNTY.

ACKNOWLEDGMENT OF SERVICE, WAIVER AND CONSENT BY NEW BOARD MEMBERS

Come now A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr., and Mrs. W. E. Pendleton, Jr., and ask that they may be substituted as parties defendant in error in accordance with the attached motion of Charles E. Newton, et al., acknowledge service of the bill of exceptions, waive all further service and notice and consent that the case may proceed.

This 21st day of May, 1964.

A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr., Mrs. W. E. Pendleton, Jr.

[fol. 119]

EXHIBIT "A" TO MOTION TO SUBSTITUTE PARTIES DEFENDANT IN ERROR

GEORGIA, BIBB COUNTY.

RESIGNATION OF BOARD OF MANAGERS OF BACONSFIELD

Come now Charles E. Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, George P. Rankin, Jr., Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody, all of said State and County, in their respective capacities as members of the Board of Managers of Baconsfield and pursuant to the order of Honorable O. L. Long, Judge Superior Courts, Macon Circuit, dated March 10, 1964, the resignation of The City of Macon as Trustees under Items IX and X of the Last Will and Testament of Augustus Octavius Bacon, deceased, having been accepted; and three (3) individual Trustees having been appointed by the said Superior Court to serve in lieu of The City of Macon in said capacity, the undersigned do hereby tender to said Trustees their respective resignations as members of said Board of Managers of Baconsfield.

This 18th day of March, 1964.

/s/ CHARLES E. NEWTON, JR.

/s/ MRS. T. J. STEWART

/s/ FRANK M. WILLINGHAM

/s/ MRS. FRANCIS K. HALL

/s/ GEORGE P. RANKIN, JR.

/s/ MRS. FREDERICK W. WILLIAMS

/s/ MRS. KENNETH W. DUNWODY

[fol. 120]

EXHIBIT "B" TO MOTION TO SUBSTITUTE PARTIES DEFENDANT IN ERROR

GEORGIA, BIBB COUNTY.

ACCEPTANCE OF RESIGNATION OF BOARD OF MANAGERS

Come now Hugh M. Comer, Lawton Miller and B. L. Register and after due consideration formally accept the resignation of Charles E. Newton, Frank M. Willingham, George P. Rankin, Jr., Mrs. Francis K. Hall, Mrs. T. J. Stewart, Mrs. Frederick W. Williams, and Mrs. Kenneth W. Dunwody from the Board of Managers of Baconsfield, such resignation being dated March 18, 1964.

This the 21st day of May, 1964.

/s/ HUGH M. COMER
Hugh M. Comer

/s/ LAWTON MILLER
Lawton Miller

/s/ B. L. REGISTER
B. L. Register

APPOINTMENT OF NEW BOARD OF MANAGERS

Further, we, the said Hugh M. Comer, Lawton Miller and B. L. Register hereby appoint to the Board of Managers of Baconsfield for terms of office to begin immediately, the following persons: A. M. Anderson, Mrs. Francis K. Hall, Mrs. R. A. McCord, Jr., Mrs. Dan O'Callaghan, Mrs. W. E. Pendleton, Jr., George P. Rankin, Jr., and Frank M. Willingham.

This the 21st day of May, 1964.

/s/ HUGH M. COMER
Hugh M. Comer

/s/ LAWTON MILLER
Lawton Miller

/s/ B. L. REGISTER
B. L. Register

[fol. 121]

ACCEPTANCE OF APPOINTMENT BY NEW BOARD

Come now A. M. Anderson, Mrs. Francis K. Hall, Mrs. R. A. McCord, Jr., Mrs. Dan O'Callaghan, Mrs. W. E. Pendleton, Jr., George P. Rankin, Jr., and Frank M. Willingham and accept appointment to the Board of Managers of Baconsfield for terms to begin immediately.

This the 21st day of May, 1964.

/s/ A. M. ANDERSON
A. M. Anderson

/s/ MRS. FRANCIS K. HALL
Mrs. Francis K. Hall

/s/ MRS. R. A. MCCORD, JR.
Mrs. R. A. McCord, Jr.

/s/ MRS. DAN O'CALLAGHAN
Mrs. Dan O'Callaghan

/s/ MRS. W. E. PENDLETON, JR.
Mrs. W. E. Pendleton, Jr.

/s/ GEORGE P. RANKIN, JR.
George P. Rankin, Jr.

/s/ FRANK M. WILLINGHAM
Frank M. Willingham

[fol. 122]

ORDER GRANTING MOTION TO SUBSTITUTE PARTIES DEFENDANT, ETC.—June 6, 1964

The within motion having been presented to this Court and it being made to appear that A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr. and Mrs. W. E. Pendleton, Jr. have consented to be made parties defendant in error and have acknowledged service of the bill of exceptions and have waived all further service and notice and have consented that the case may proceed:

Wherefore, It Is Hereby Ordered and Adjudged that A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr. and Mrs. W. E. Pendleton, Jr. are made additional

parties defendant in error and that Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody are hereby stricken as parties defendant in error.

This the 6th day of June, 1964.

....., Presiding Justice, Supreme Court of Georgia.

[fol. 123]

Certificate of Service

Georgia, Bibb County.

I, Willis B. Sparks, III, of counsel of record for the defendants-in-error, the Members of the Board of Managers of Baconsfield, certify that I have served the foregoing motion and accompanying two exhibits and acknowledgment of service and waiver by the four new Board members and order upon the plaintiffs-in-error by mailing a copy of the same to their attorney of record, Donald L. Hollowell, at his office at 859½ Hunter Street, Northwest, Atlanta, Georgia.

I further certify that I have mailed a copy of all the above described documents to Mr. Jack Greenberg, 10 Columbus Circle, New York, New York, Mr. Greenberg appearing on the brief of the plaintiffs-in-error as co-counsel in the case.

I further certify that I have served the defendant-in-error, City of Macon, by mailing a copy of the said motion and the said two accompanying exhibits and the said acknowledgment of service and waiver by the four new Board members and order to its attorney of record, Trammell F. Shi, at his office in the Southern United Building in Macon, Georgia.

I acknowledge service on behalf of Guyton Abney, et al., as Successor Trustees under the Will of A. O. Bacon and I further acknowledge service for W. B. Sparks, Jr., et al., as the "Sparks heirs" of A. O. Bacon.

This the 26th day of May, 1964.

Willis B. Sparks, 3rd.

[fol. 124] [File endorsement omitted]

[fol. 125]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

REV. E. S. EVANS, LOUIS H. WYNN, REV. J. L. KEY, REV. BOOKER W. CHAMBERS, WILLIAM RANDALL, and REV. VAN J. MALONE, Plaintiffs-in-Error,

vs.

THE CITY OF MACON: A. O. B. SPARKS, JR., VIRGINIA LAMAR SPARKS, M. BARTON SPARKS, Heirs at Law of A. O. BACON; GUYTON ADLEY, J. D. CRUMP, J. J. DENMARK, DR. W. G. LEE, Successor Trustees under the Will of A. O. BACON; CHARLES NEWTON, MRS. T. J. STEWART, FRANK M. WILLINGHAM, MRS. FRANCIS K. HALL, GEORGE P. RANKIN, JR., MRS. FREDERICK W. WILLIAMS, and MRS. KENNETH DUNWOODY, Members of the Board of Managers under Will of A. O. BACON; HUGH M. COMER, LAWTON MILLER, and B. L. REGISTER, Successor Trustees in Lieu of The City of Macon, Defendants-in-Error.

MOTION TO ADD PARTIES DEFENDANT-IN-ERROR AND TO DENY DEFENDANTS-IN-ERROR'S MOTION TO SUBSTITUTE PARTIES DEFENDANT-IN-ERROR—Filed June 4, 1964

To the Honorable Chief Justice and the Honorable Justice of the Supreme Court of Georgia:

Come now the plaintiffs-in-error, Rev. E. S. Evans, Louis H. Wynn, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone in the above-styled case and pray that this Honorable Court add the following named persons as defendants-in-error: A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr., and Mrs. W. E. Pendleton, Jr., and deny the defendants-in-error's motion to substitute these named defendants-in-error in lieu of defendants-in-error Charles E. Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, for the following reasons:

[fol. 126] The said motion filed in this Honorable Court by defendants-in-error Charles E. Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, George P. Rankin, Jr., Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwoody shows that they submitted their resignations as members of the Board of Managers of Baconsfield. This joint resignation was submitted to Hugh Comer, Lawton Miller, and B. L. Register, new trustees of Baconsfield, on March 18, 1964. The said resignations were accepted by the said Trustees on May 21, 1964. However, the appeal of this case to this Honorable Court by the plaintiffs-in-error was docketed in this Honorable Court on May 8, 1964. The said new trustees, having been notified that the appeal was docketed, had no authority to accept the resignation of the named defendants-in-error or to take any other action affecting the status of the parties or property involved in this case, pending a determination of the issues involved in this case by this Honorable Court. Therefore, plaintiffs-in-error submit that the attempted resignation by the named defendants-in-error was null and void.

Wherefore, plaintiffs-in-error pray that:

(1) A. M. Anderson, Mrs. R. A. McCord, Jr., Mrs. Dan O'Callaghan, and Mrs. W. E. Pendleton, Jr., be made parties defendants-in-error; and

(2) The defendants-in-error's prayer that Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams, and Mrs. Kenneth W. Dunwoody be stricken as parties defendant-in-error, be denied.

Donald L. Hollowell, William H. Alexander, 859½ Hunter Street, Northwest, Atlanta, Georgia.

Jack Greenberg, James M. Nabrit, III, 10 Columbus Circle, New York, New York 10019, Attorneys for Plaintiffs-in-Error.

[fol. 127] Certificate of Service (omitted in printing).

[fol. 128]

ORDER

The foregoing motion having been read and considered, the same is allowed and ordered filed.

Wherefore, it is ordered and adjudged that A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr., and Mrs. W. E. Pendleton, Jr. are made parties defendant-in-error. Further, the motion of the defendants-in-error to strike Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams, and Mrs. Kenneth W. Dunwoody, referred to in this motion, is denied.

This the day of June, 1964.

..... Justice, Supreme Court of Georgia.

[fol. 129] [File endorsement omitted]

[fol. 130]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

E. S. EVANS et al.,

v.

CHARLES E. NEWTON et al.

ORDER GRANTING SECOND MOTION TO AMEND THE BILL OF EXCEPTIONS, ETC.—September 25, 1964

Upon consideration of the second motion to amend the bill of exceptions by E. S. Evans et al., the designated plaintiffs in error in this case, filed in the Supreme Court on May 18, 1964, so as to substitute the plaintiffs in error designated in the said motion for those designated in the bill of exceptions and to substitute the defendants in error designated in the said motion for those designated in the

bill of exceptions, it is ordered that the said motion be hereby granted.

Let a copy of this order be mailed to counsel for each side.

[fol. 131]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

E. S. EVANS et al.,

v.

CHARLES E. NEWTON et al.

ORDER GRANTING MOTION BY CHARLES E. NEWTON ET AL., DEFENDANTS IN ERROR, ETC.—September 28, 1964

Upon consideration of the motion by Charles E. Newton et al., defendants in error in this case, to make A. M. Anderson, Mrs. R. A. McCord, Mrs. Dan O'Callahan and Mrs. W. E. Pendleton, Jr., parties defendant in error and to strike Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwoody as parties defendant in error, it is ordered that the said motion be granted in so far as it names additional parties defendant in error and is denied in so far as it seeks to strike parties defendant in error.

Let a certified copy of this order be mailed to counsel for each side.

[fol. 132]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

EVANS et al.,

v.

NEWTON et al.

The record does not support the contentions of the plaintiffs in error, and the judge could not properly have gone beyond the judgment rendered. The judgment is not shown to be erroneous for any of the reasons urged by counsel for the plaintiffs in error.

Argued June 8, 1964

Decided September 28, 1964

Rehearing denied October 8, 1964.

Equitable petition. Bibb Superior Court. Before Judge Long.

[fol. 133]

OPINION—September 28, 1964

The will of A. O. Bacon (which was probated in solemn form) in Item Nine gave in trust described property, to be known as "Baconsfield," to named trustees for the benefit of his wife and two named daughters for their joint use, benefit, and enjoyment during the term of their natural lives. It was provided that upon the death of the last survivor, the property, including all remainders and reversions, "shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever

used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control" of a board of managers consisting of seven persons, not less than four to be white women and all seven to be white persons. In order to provide for the maintenance of the park, income from described real property and bonds was to be expended by the board of managers.

Charles E. Newton and others, as members of the Board [fol. 134] of Managers of Baconsfield, brought an equitable petition against the City of Macon (in its capacity as trustee under Item Nine of the will of A. O. Bacon), and Guyton G. Abney and others, as successor trustees under the will holding assets for the benefit of certain residuary beneficiaries. It was alleged: The city as trustee holds the legal title to a tract of land in Macon, Bibb County, known as Baconsfield, under Item Nine of the will of A. O. Bacon. As directed in the will, the board through the years has confined the exclusive use of Baconsfield to those persons designated in the will. The city is now failing and refusing to enforce the provisions of the will with respect to the exclusive use of Baconsfield. Such conduct on the part of the city constitutes such a violation of trust as to require its removal as trustee. It was prayed that: the city be removed as a trustee under the will; the court enter a decree appointing one or more freeholders, residents of the city, to serve as trustee or trustees under the will; legal title to Baconsfield and any other assets held by the city as trustee be decreed to be in the trustee or trustees so appointed [fol. 135] for the uses originally declared by the testator; and for further relief.

The City of Macon filed its answer asserting that it can not legally enforce racial segregation of the property known as Baconsfield, and therefore it is unable to comply with the specific intention of the testator with regard to maintaining the property for the exclusive use, benefit, and enjoyment of the white women, white girls, white boys, and white children of the city. The city prayed that the court construe the will and enter a decree setting forth the duties and obligations of the city in the premises. The other

defendants admitted the allegations of the petition and prayed that the city be removed as a trustee. The petitioners thereafter filed a motion for summary judgment.

Reverend E. S. Evans and others, alleging themselves to be Negro residents of the City of Macon, on behalf of themselves and other Negroes similarly situated, filed an intervention in the cause and asserted: The restriction and limitation reserving the use and enjoyment of Baconsfield [fol. 136] Park to "white women, white girls, white boys and white children of the City of Macon," is violative of the public policy of the United States of America and violative of the Constitution and laws of the State of Georgia. The court as an agency of the State of Georgia can not, consistently with the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and the equivalent provision of the Constitution of the State of Georgia, enter an order appointing private citizens as trustees for the manifest purpose of operating, managing, and regulating public property (which passed to the City of Macon under charitable trust created by will) in a racially discriminatory manner. Although the charitable device at the time of its creation was capable of being executed in the exact manner provided by the will, by operation of law it is no longer capable of further execution in the exact manner provided for by the testator. The court should effectuate the general charitable purpose of the testator to establish and endow a public park by refusing to appoint private persons as trustees.

By amendment to the petition it was alleged: By the [fol. 137] will of A. O. Bacon a trust was established for his heirs. The trust has been executed as to four of his seven heirs now living, A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks, and M. Garten Sparks. The interests of three remaining heirs, Louise Curry Williams, Shirley Curry Cheatham, and Manley Lamar Curry, are still held under an executed trust by four trustees holding under the authority of the will, these trustees being Guyton Abney, J. D. Crump, T. I. Denmark, and Dr. W. G. Lee. These seven persons have an interest in the litigation since,

if the trust purpose expressed in the will with respect to the designation of persons who may use Baconsfield should fail, the property comprising Baconsfield, together with the property providing the upkeep of Baconsfield, will revert to the estate of A. O. Bacon and be distributed to these heirs. The amendment prayed that the Sparks heirs be allowed to intervene and that the trustees be allowed to assert the interests of the other heirs. It was also prayed that the Negro intervenors and other members of the Negro race resident in Macon be permanently enjoined from enter- [fol. 138] ing and using the facilities of Baconsfield. The Sparks heirs and the trustees of the other heirs of A. O. Bacon filed an intervention praying that the relief sought by the original petitioners be granted, but that if such relief not be granted, the property revert to them.

The City of Macon filed an amendment to its answer, alleging that pursuant to resolution adopted by the Mayor and Council of the city at its regular meeting on February 4, 1964, the city has resigned as trustee under the will of A. O. Bacon. It prayed that the resignation be accepted by the court.

The Negro intervenors filed an amendment to their intervention in which they asserted: The equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits the court from enjoining Negroes from the use of the park, and from accepting the resignation of the City of Macon as trustee and appointing new trustees for the purpose of enjoining (enforcing?) the racially discriminatory provision in the will of A. O. Bacon. Code § 69-504 prescribes racial discrimination and is therefore [fol. 139] violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Since the racially discriminatory provision in the will was dictated by that unconstitutional statute, enforcement of the racially discriminatory provision is constitutionally prohibited. Code § 108-202, properly construed, requires that the racially discriminatory provision in the will be declared null and void. The intervenors prayed that the court withhold approval of the attempted resignation of the city as

trustee under the will, direct the city to continue to administer the park on a racially nondiscriminatory basis, and deny the injunction sought by the petitioners to exclude Negroes from the use of the park.

On March 10, 1964, the judge of the superior court entered an order and decree in the case which adjudged as follows: (1) The intervenors named are proper parties in the case and are proper representatives of the class which their intervention states that they represent, the Negro citizens of Bibb County and the City of Macon. (2) The defendants, Guyton G. Abney, J. D. Crump, T. I. Denmark, [fol. 140] and Dr. W. G. Lee, as successor trustees under the will of A. O. Bacon, and intervenors A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks are also proper parties. (3) The City of Macon having submitted its resignation as the trustee of the property known as Baconsfield, the resignation is accepted by the court. (4) Hugh M. Comer, Lawton Miller, and B. L. Register are appointed as trustees to serve in lieu of the City of Macon. (5) The court retains jurisdiction for the purpose of appointing other trustees that may be necessary in the future. (6) It is unnecessary to pass upon the secondary contention of the intervenors Guyton G. [Abney and others.

Reverend E. S. Evans and others in their writ of error to this court assign error on this order of the trial judge. Their contentions will appear from the opinion.

Donald L. Hollowell, William H. Alexander, Jack Greenberg, James M. Nabrit, III, for plaintiff in error.

Jones, Sparks, Benton & Cork, Trammell F. Shi, contra.

[fol. 141] ALMAND, Justice. Counsel for the plaintiffs in error (the Negro intervenors) assert that the decree of the judge of the superior court was "patent enforcement of racial discrimination contrary to the equal protection clause of the Fourteenth Amendment" to the Federal Constitution. The decree did not enforce, or purport to enforce, any judgment, ruling, or decree as related to the intervenors. After determining that all parties were properly before the court, the decree did two things: (1) Accepted the resignation of

the City of Macon as trustee of Baconsfield; and (2) appointed new trustees.

"The law of charities is fully adopted in Georgia . . . " Jones v. Habersham, 107 U.S. 174 (5) (2 SC 336, 27 LE 401). Under the law of this State any person may, by will, grant, gift, deed, or other instrument, give or devise property for any charitable purpose. Ga. L. 1937, p. 593 (Code Ann. § 108-207). Any public convenience might be a proper subject for a charitable trust. Code § 108-203. A charity once established is always subject to supervision and direction by a court of equity to render effectual its purpose. Code § 108-204. It is the rule that a charitable trust shall never fail for the want of a trustee. Code § 108-302.

Whether the will of A. O. Bacon, establishing a trust [fol. 142] for the operation of Baconsfield, contemplated by the language, "to the Mayor and Council of the City of Macon and *to their* successors" (italics ours), that the named trustee might resign, need not be determined. The City of Macon did resign, and the judge of the superior court was confronted with the commandment of Code § 108-302 that a trust shall never fail for the want of a trustee. Being empowered to appoint trustees when a vacancy occurs for any cause, *Thompson* v. *Hale,* 123 Ga. 305 (51 SE 383), *Harris* v. *Brown,* 124 Ga. 310 (2) (52 SE 610, 2 LRA (NS) 828), *Woodbery* v. *Atlas Realty Co.,* 148 Ga. 712 (98 SE 472), *Sparks* v. *Ridley,* 150 Ga. 210 (3) (103 SE 425), the judge exercised such power and appointed successor trustees.

The contention by counsel for the plaintiffs in error that Code § 69-504 required A. O. Bacon to limit the use of Baconsfield to the members of one race can not be sustained. Code § 69-504, in providing for gifts limited to members of a race, simply states that any person *may* "devise, give, etc." The law of Georgia does not by Code § 69-504, nor by any other statutory provision, require that any testator shall limit his beneficence to any particular race, class, color, or creed. Such limitation, however, standing alone, is not invalid, and this court has sustained a testa- [fol. 143] mentary charity naming trustees for establishing and maintaining "a home for indigent colored people 60

years of age or older residing in Augusta, Georgia." *Strother* v. *Kennedy,* 218 Ga. 180 (127 SE2d 19). A. O. Bacon had the absolute right to give and bequeath property to a limited class.

Counsel for the plaintiffs in error assert that: "As the City was unable to comply with the racially discriminatory direction of the trust, three alternatives were open to the lower court: (1) declare the racially discriminatory provision null and void; (2) remove the trustee (or accept its resignation) and appoint a non-governmental trustee; (3) declare failure of the trust." They insist that the judge should have chosen the first alternative.

Counsel for plaintiffs in error assert that the court should have applied the provisions of Code § 108-202 that when a valid charitable bequest is incapable for some reason of exact execution in the exact manner provided by the testator a court of equity will carry it into effect in such way as nearly as possible to effectuate his intention. The answer to this contention is: the application of the cy-pres rule, as provided in this Code section, was not invoked [fol. 144] by the primary parties to this case, and even if it be conceded (which we do not concede, see *Smith* v. *Manning,* 155 Ga. 209, 116 SE 813, and *Fountain* v. *Bryan,* 176 Ga. 31, 166 SE 766) that the intervenors could raise such issue, the facts before the trial judge were wholly insufficient to invoke a ruling that the charitable bequest was or was not incapable for some reason of exact execution in the exact manner provided by the testator. There is no testimony in the record of any nature or character, that the board of managers provided by the will, can not operate the park pursuant to the terms and conditions of the will.

Counsel for the plaintiffs in error cite *Pennsylvania* v. *Board of Directors of City Trusts of the City of Philadelphia,* 353 U.S. 230 (77 SC 806, 1 LE2d 792). In the *Pennsylvania* case the United States Supreme Court pointed out that the board which operated Girard College was an agency of the State of Pennsylvania by legislative act, and that the refusal to admit Negroes to Girard College was therefore discrimination by the State. Upon the return of

the case to the Supreme Court of Pennsylvania for further proceedings not inconsistent with the opinion, that court remanded the case to the Orphans' Court for further pro-
[fol. 145] ceedings not inconsistent with the opinion of the Supreme Court of the United States. The Supreme Court of Pennsylvania, on the second appearance of the case (see *Girard College Trusteeship,* 391 Pa. 434, 138 A2d 844), stated that the Orphans' Court construed the United States Supreme Court's opinion to mean that the Board of City Trustees was constitutionally incapable of administering Girard College in accordance with the testamentary requirements of the founder, and the Orphans' Court entered a decree removing the Board as trustee of Girard College and substituting therefor thirteen private citizens, none of whom held any public office or otherwise exercised any governmental power under the Commonwealth of Pennsylvania. The Supreme Court of Pennsylvania affirmed this action on review, and again sustained action denying admission to Girard College by the Negro applicants. Counsel for the defendants in error cite *Girard College Trusteeship,* 391 Pa. 434, and strongly rely on this Pennsylvania case. (On review by the United States Supreme Court the motion to dismiss was granted, and treating the record as a petition for certiorari, certiorari was denied. *Pennsylvania* v. *Board of Directors of City Trusts of Pennsylvania,* 357 U.S. 570 (78 SC 1383, 2 LE2d 1546). A motion for rehear-
[fol. 146] ing was denied. (358 U.S. 858.) In so far as the *Girard College Trusteeship* case is applicable on its facts to the present case, it supports the rulings we have made.

The record does not sustain the contentions of the plaintiffs in error, and the judge could not properly have gone beyond the judgment rendered. This judgment is not shown to be erroneous for any of the reasons urged by counsel for the plaintiffs in error.

Judgment affirmed. All the Justices concur.

[fol. 147]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

E. S. EVANS et al.,

v.

CHARLES E. NEWTON et al.

JUDGMENT—September 28, 1964

This case came before this court upon a writ of error from the Superior Court of Bibb County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

[fol. 148]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Decided September 28, 1964

Docket No. 22534

REV. E. S. EVANS, LOUIS H. WYNN, REV. J. L. KEY, REV. BOOKER W. CHAMBERS, WILLIAM RANDALL, and REV. VAN J. MALONE, Plaintiffs-in-Error,

vs.

THE CITY OF MACON; A. O. B. SPARKS, JR., VIRGINIA LAMAR SPARKS, M. BARTON SPARKS, Heirs at Law of A. O. BACON; GUYTON ADLEY, J. D. CRUMP, J. J. DENMARK, DR. W. G. LEE, Successor Trustees under the Will of A. O. BACON; CHARLES NEWTON, MRS. T. J. STEWART, FRANK M. WILLINGHAM, MRS. FRANCIS K. HALL, GEORGE P. RANKIN, JR., MRS. FREDERIC W. WILLIAMS, and MRS. KENNETH DUNWOODY, Members of the Board of Managers under Will of A. O. BACON; HUGH M. COMER, LAWTON MILLER, and B. L. REGISTER, Successor Trustees in Lieu of The City of Macon, Defendants-in-Error.

No change. Denied. All the Justices concur.

MOTION FOR REHEARING—Filed October 5, 1964

Comes now Rev. E. S. Evans, Louis H. Wynn, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, plaintiffs-in-error, and within the time allowed by law, file this their Motion for Rehearing in the above-stated case, and for grounds thereof, say:

1.

That plaintiffs-in-error believe that this Honorable Court has overlooked the following material fact in the record: Item 9th of the will of A. O. Bacon provides, *inter alia*, that certain property should be left in trust to the "Mayor and Council of the city of Macon, and to their successors". The said item also provides that "The Members of this Board [of Managers] shall first be selected and appointed by the Mayor and Council of the city of Macon, or by their [fol. 149] successors . . . ; and all vacancies on said Board shall be filled by appointments made by the Mayor and Council of the City of Macon . . . , upon nomination made by the Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors." Plaintiffs-in-error aver that the phrase "their successors" as used *supra* in the relevant context makes it quite clear that the successors referred to are the persons occupying the positions of Mayor and councilman of the city of Macon and not persons who have no official position or office with the City of Macon. A reading of the will in its entirety makes it clear to plaintiffs-in-error that it was the testator's intent that the Mayor and Council (or persons succeeding them in those positions) should remain as trustees under the will. Accordingly, the Bibb Superior Court did not effectuate the testator's intent by allowing the City of Macon to resign and was in error in so doing.

2.

That while the language in Georgia Code Annotated Section 69-504 appears to be permissive, the testator was in fact required to limit his beneficence to members of a

particular race. This requirement was the results of the said Code section plus the customs which prevailed at the time the testator's will was drawn. The said Code section cannot be read or properly understood unless done so with a realization that patterns of segregation which were fostered and perpetuated by the State, existed at the time the will was drawn. The plaintiffs-in-error respectfully refer this court to *Robinson* v. *Florida*, 84 S. Ct. 1693 (1964). In *Robinson*, the State statute did not require restaurants to segregate Negroes and whites. Nevertheless, the Court held that Florida, as did Georgia in the instant case, became involved to such a significant extent that the case must be held to reflect State policy requiring segregation contrary to the Fourteenth Amendment to the United States [fol. 150] Constitution. In reality, the use of precatory words in Section 69-504 does not mean that the testator had a choice in the instant case anymore than the restaurants did in the *Robinson* case.

Wherefore, movants pray that a rehearing be granted in this case and that the judgment of the court below be reversed.

Donald L. Hollowell, William H. Alexander, 859½ Hunter Street, N. W., Atlanta, Georgia 30314;

Jack Greenberg, James M. Nabritt III, 10 Columbus Circle, New York, New York 10019;

Attorneys for Plaintiffs-in-Error.

[fol. 151]

CERTIFICATE OF PROBABLE CAUSE FOR REHEARING

I, William H. Alexander, of counsel for plaintiffs-in-error in the foregoing case, do certify that, upon careful examination of the opinion of the Court in this case, I verily believe that the facts and the decision mentioned in the attached motion have been overlooked by the Court, which facts and decision are material, and, if considered would require a different judgment from that rendered.

I also certify that a copy of the foregoing motion for rehearing has been served upon opposing counsel of record,

Trammel F. Shi and Jones, Sparks, Benton and Cork, by placing a copy in the United States Mail, postage prepaid, addressed to said counsel at their address of record.

This 5th day of October, 1964.

William H. Alexander

Sworn to and subscribed before me this 5 day of October, 1964.

Mary E. Dobbs, Notary Public, Georgia State at Large. My Commission Expires June 22, 1968.

[fol. 152] [File endorsement omitted]

[fol. 153]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

22534

E. S. EVANS *et al.*,

v.

CHARLES E. NEWTON *et al.*

ORDER DENYING MOTION FOR REHEARING—October 8, 1964

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

[fol. 154] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 155]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1964

E. S. EVANS, et al., Petitioners,

vs.

CHARLES E. NEWTON, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—December 22, 1964

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 5, 1965.

Potter Stewart, Associate Justice of the Supreme Court of the United States.

Dated this 22nd day of December, 1964.

[fol. 156]

SUPREME COURT OF THE UNITED STATES

No. 959—October Term, 1964

E. S. EVANS, et al., Petitioners,

v.

CHARLES E. NEWTON, et al.

ORDER ALLOWING CERTIORARI—April 26, 1965

The petition herein for a writ of certiorari to the Supreme Court of the State of Georgia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 5 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 61

E. S. EVANS, *et al.*,

Petitioners,

—v.—

CHARLES E. NEWTON, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

E. S. EVANS, *et al.*,

Petitioners,

—v.—

CHARLES E. NEWTON, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in the case of *E. S. Evans, et al.* v. *Charles E. Newton, et al.*,* entered on September 28, 1964. Rehearing was denied on October 8, 1964. Mr. Justice Stewart, on December 22, 1964, granted an order extending the time for filing this petition for writ of certiorari to and including March 5, 1965.

Opinion Below

The opinion of the Supreme Court of Georgia (R. 132) is reported at 138 S. E. 2d 573 and is set forth in the appendix *infra*, p. 1a.

* Petitioners are E. S. Evans, Louis H. Wynn, J. L. Key, Booker W. Chambers, William Randall, and Van J. Malone. The respondents are all parties who were defendants in error in the Supreme Court of Georgia. See note 5 *infra*.

Jurisdiction

The judgment of the Supreme Court of Georgia in this case was entered on September 28, 1964 (R. 147). Rehearing was denied October 8, 1964 (R. 153). On December 22, 1964, Mr. Justice Stewart extended the time for filing the petition for writ of certiorari to and including March 5, 1965.

The jurisdiction of this Court is invoked pursuant to Title 28, U. S. C. §1257(3), petitioners having asserted below and asserting here deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

1. Land was left in trust to the City of Macon, Georgia, for use as a public park for the exclusive use of white women and children; the city administered the park on a discriminatory basis through an appointed board of managers; after Negroes were allowed to use the park, the city and the board of managers petitioned a court of equity to appoint new trustees so that Negroes might be excluded from the park; the court appointed new trustees for that purpose. Is the state thereby enforcing racial discrimination contrary to the Fourteenth Amendment?

2. In the above circumstances a state statute authorized gifts of land in trust for the establishment of parks limited to white women and children; the state granted tax exemption to such trusts only if use of such parks were limited according to race; the state by law encouraged the establishment of charitable trusts to fulfill a public function of providing public recreational facilities; the state granted

limited liability in tort cases to such charitable institutions; the state granted them perpetual existence, unlike non-charitable trusts; and the City of Macon administered the park for years on a discriminatory basis. Has the state become involved in the operation of the park to such an extent as to require the applicability of the equal protection clause of the Fourteenth Amendment?

Statutory and Constitutional Provisions Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following constitutional and statutory provisions of the State of Georgia:

Const. Ga. 1945, art. 7, sec. 1, par. 4, Ga. Code Ann. §2-5404:

> Exemptions from taxation.—The General Assembly may, by law, exempt from taxation all public property; places of religious worship or burial and all property owned by religious groups used only for residential purposes and from which no income is derived; all institutions of purely public charity; all intangible personal property owned by or irrevocably held in trust for the exclusive benefit of, religious, educational and charitable institutions, no part of the net profit from the operation of which can inure to the benefit of any private person; all buildings erected for and used as a college, incorporated academy or other seminary of learning, and also all funds or property held or used as endowment by such colleges, incorporated academies or seminaries of learning, provided the same is not invested in real estate; and provided, further, that said exemptions shall only apply to such colleges, incorpo-

rated academies or other seminaries of learning as are open to the general public; provided further, that all endowments to institutions established for white people, shall be limited to white people, and all endowments to institutions established for colored people, shall be limited to colored people; . . .

Ga. Code Ann. §92-201:

Property exempt from taxation.—The following described property shall be exempt from taxation, to wit: All public property; places of religious worship or burial, and all property owned by religious groups used only for single family residences and from which no income is derived; all institutions of purely public charity; hospitals not operated for the purpose of private or corporate profit and income; all intangible personal property owned by or irrevocably held in trust for the exclusive benefit of, religious, educational and charitable institutions, no part of the net profit from the operation of which can inure to the benefit of any private person; all buildings erected for and used as a college, nonprofit hospital, incorporated academy or other seminary of learning, and also all funds or property held or used as endowment by such colleges; nonprofit hospitals, incorporated academies or seminaries of learning, providing the same is not invested in real estate; and provided, further, that said exemptions shall only apply to such colleges, nonprofit hospitals, incorporated academies or other seminaries of learning as are open to the general public: Provided, further, that all endowments to institutions established for white people, shall be limited to white people, and all endowments to institutions established for colored people, shall be limited to colored people; . . .

Ga. Code Ann. §69-504:

> Gifts for public parks or pleasure grounds.—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said divisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property.

Statement

This suit was commenced by some of the respondents to effect the banishment of Negroes from a public park established in Macon, Georgia under the will of Augustus Octavius Bacon, a United States senator from Georgia. The will of Senator Bacon (R. 19), executed on March 28, 1911,[1] provided in Item 9th for a gift of real property to the City of Macon as owner and trustee for the maintenance of a park for the white women and children[2] of the City of

[1] A codicil was added September 6, 1913 (R. 43).

[2] The Board of Managers was given discretion to open the park to white men and white non-residents of Macon (R. 31). This power was exercised (R. 15).

Macon, under the supervision of a Board of Managers appointed by the Mayor and Council (R. 27). The will set aside a separate fund in trust to defray expenses of administering the park (R. 34). The park, named Baconsfield, was operated in accordance with the racial limitation in Bacon's will until a short time before this suit was instituted, when Negroes were allowed to use the park (R. 15).

On May 4, 1963, Charles E. Newton and other members of the Board of Managers of Baconsfield[3] filed a petition in the Superior Court of Bibb County, Georgia, requesting the removal of the City of Macon as trustee, the appointment of new trustees, and the transfer of title in Baconsfield to newly appointed trustees. Named as defendants were the City of Macon and the trustees of certain residuary legatees of Bacon's estate, the Curry heirs.[4] This relief was sought explicitly for the purpose of enforcing the racially discriminatory terms of Bacon's will (R. 12-17).

The City of Macon filed its answer (R. 47) admitting most allegations of the petition, but stating that it had "no authority to enforce racially discriminatory restrictions with regard to property held in fee simple or as trustees for a private or public trust and, as a matter of law, is prohibited from enforcing such racially discriminatory restrictions" (R. 48). The defendant trustees for the Curry heirs filed their answer admitting all allegations of the petition and joining in "each and every prayer of said petition" (R. 51); they were represented by the same counsel as the plaintiff members of the Board of Managers (R.

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[3] The Board of Managers did not sue as an entity. Each member sued, through private counsel, in his capacity as member of the Board (R. 12).

[4] The trustees for the Curry heirs were Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee (R. 12).

17, 51). Plaintiffs filed a motion for summary judgment (R. 54).

On May 29, 1963, a diversity of interest appeared in this lawsuit for the first time when Rev. E. S. Evans and five other Negro citizens of the City of Macon, petitioners here, moved for leave to file a petition in intervention (R. 56). In their intervention petition of June 18, 1963, the Negro intervenors alleged that the appointment of new trustees of the park in order to comply with the racial limitation in Bacon's will would violate the Fourteenth Amendment (R. 61). The intervenors requested that the Superior Court "effectuate the general charitable purpose of the testator to establish and endow a public park within the City of Macon by refusing to appoint private persons as trustees" of the park (R. 62-63). Their petition also challenged the plaintiffs' standing to sue (R. 63).

On January 8, 1964, the plaintiff members of the Board of Managers filed an amendment to their original petition requesting that all Negroes be enjoined from using the park (R. 65). The amendment requested the addition as plaintiffs of four previously unrepresented residuary legatees under Bacon's will, the Sparks heirs (R. 66); a request was also made that the trustees of the Curry heirs, originally joined as defendants, be permitted to assert the interests of the Curry heirs as plaintiffs (R. 67). Simultaneously, the Sparks heirs intervened, asking that all relief requested by the original plaintiffs be granted (R. 69). Also at the same time, the trustees for the Curry heirs asked to be allowed to assert their interests as plaintiffs, and joined in all of the plaintiffs' prayers for relief (R. 72). In addition, the Sparks heirs and the trustees for the Curry heirs, all of whom were represented by counsel for the plaintiff Board members, asked for reversion of the trust property into Bacon's estate in the event that other relief were denied (R. 70, 74).

On February 5, 1964, the City of Macon, the only defendant making any pretense of defending the suit, amended its answer stating that the City had resigned as trustee of Baconsfield (R. 94) pursuant to resolution of the Mayor and Council on February 4, 1964 (R. 79), and requesting the court's acceptance of its resignation and the appointment of substitute trustees (R. 76).

On May 5, 1964, the Negro intervenors amended their petition, alleging that the Fourteenth Amendment would be violated if the relief sought by the other parties were granted (R. 95).

No evidentiary hearing was held. The Superior Court issued its decree on March 10, 1964, allowing intervention by all who had requested it, accepting the resignation of the City of Macon as trustee of Baconsfield, appointing three private individuals as new trustees, and retaining jurisdiction of the case (R. 99). No ruling was made on the requests that Negroes be enjoined from using the park. The conditional prayers for reversion of the trust property were deemed moot (R. 100).

Appeal was taken to the Supreme Court of Georgia by petitioners, the Negro intervenors.[5] On September 28, 1964, the Supreme Court of Georgia affirmed the judgment of

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[5] The defendants in error on the appeal were the City of Macon, the four Sparks heirs, the four trustees for the Curry heirs, and the three newly appointed trustees of the park. By amendment to the bill of exceptions, the original plaintiffs, the members of the Board of Managers of Baconsfield, were added as defendants in error on the appeal (R. 105, 110, 130). Subsequent to the decree of the Superior Court, all seven members of the Board of Managers of Baconsfield submitted their resignations to the three newly appointed trustees of the park (R. 115). The trustees then reappointed three of the members of the Board of Managers and substituted four new members of the Board (R. 116). All members of the Board of Managers, whether original appointees or new appointees, were made parties to the appeal (R. 131).

the Superior Court of Bibb County. A motion for rehearing was denied on October 8, 1964 (R. 153).

How the Federal Questions Were Raised and Decided Below

The federal constitutional issues, on which this case turned, were raised at the outset by the Negro intervenors, petitioners here, in their intervention petition (R. 59). There it was alleged that enforcement of the racial limitation in Bacon's will by a court of the State of Georgia "is violative of the Fourteenth Amendment to the United States Constitution" (R. 61). It was also alleged that "discrimination based solely upon race is no longer a permissible object of state action whether such action is that of an administrative agency, the state executive officers and employees, the state legislature, or the state courts" (R. 62). The intervenors requested that the Superior Court "effectuate the general charitable purpose of the testator" by refusing to appoint private trustees (R. 62-63).

Following the intervention of Bacon's heirs and the resignation of the City of Macon, the Negro intervenors amended their petition, alleging: 1) that the "equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits this Court from enjoining Negroes from use of the park", 2) that "the equal protection clause of the Fourteenth Amendment" prohibits acceptance of the City's resignation and the appointment of new trustees "for the purpose of enjoining [sic] [enforcing] the racially discriminatory provision in the will of A. O. Bacon," 3) that §69-504 of the Georgia Code[6] "prescribes racial discrimination and is therefore violative of

[6] Section 69-504 of the Georgia Code authorized gifts of property to municipalities for the operation of parks "for white women and children" and other racially designated classes, *supra*, p. 5.

the equal protection clause to the Fourteenth Amendment", and 4) that §108-202 of the Georgia Code (the cy pres provision) "properly construed, requires that the racially discriminatory provision in A. O. Bacon's will be declared null and void" (R. 95-96).

The order of the Superior Court of Bibb County rejected the constitutional claims of the Negro intervenors by implication (R. 99). Upon issuing its order and decree, Judge Long of the Superior Court wrote a letter to counsel for all parties stating that the "racial limitation in Senator A. O. Bacon's will is not unlawful for any reason as contended by the intervenors, Reverend E. S. Evans, et al." The letter also said that the appointment of new trustees was proper since the City of Macon, acting as trustee, could not "apply constitutionally the racial criterion prescribed by the testator." The doctrine of cy pres was held to be inapplicable to this trust. Appendix, *infra,* p. 11a.

On appeal the Supreme Court of Georgia affirmed the ruling of the Superior Court (R. 147), deciding all issues adversely to petitioners. In its opinion the Supreme Court of Georgia stated: "Counsel for the plaintiffs in error (the Negro intervenors) assert that the decree of the judge of the superior court was 'patent enforcement of racial discrimination contrary to the equal protection clause of the Fourteenth Amendment' to the Federal Constitution" (R. 141). The court rejected this contention. It also held that Ga. Code Ann. §69-504 did not require that Senator Bacon's gift to the City include a racial limitation and held that such a racial limitation was not invalid (R. 142-143). The Supreme Court of Georgia rejected petitioners' contention that the racial limitation should be stricken under the cy pres doctrine (R. 143-144). Finally, it held that the action of the Superior Court in accepting the City's resignation as trustee and appointing private

trustees was consistent with this Court's ruling in *Pennsylvania* v. *Board of Directors of City Trusts of the City of Philadelphia,* 353 U. S. 230, pointing out that the Supreme Court of Pennsylvania subsequently approved the appointment of private trustees for Girard College and this Court dismissed the appeal and denied certiorari, *Estate of Stephen Girard,* 391 Pa. 434, 138 A. 2d 844 (1958); *Pennsylvania* v. *Board of Directors of City Trusts of the City of Philadelphia,* 357 U. S. 570 (R. 144-146).

Petitioners moved for a rehearing, contending that Ga. Code Ann. §69-504, providing for gifts of real property to municipalities for the benefit of white persons or for the benefit of Negro persons, brought this case within the holding of this Court in *Robinson* v. *Florida,* 378 U. S. 153, which held that a state regulation requiring desegregated restaurants to provide racially separate rest-room facilities constituted state encouragement of segregation in violation of the Fourteenth Amendment (R. 149). The Supreme Court of Georgia denied rehearing without opinion (R. 153).

Reasons for Granting the Writ

The decision below conflicts with applicable decisions of this Court on important constitutional issues.

I.

This Case Involves Enforcement by the State of Racial Discrimination in Violation of the Fourteenth Amendment.

This is a classic case of state enforcement of racial discrimination by every branch of government, legislative, executive, administrative, and judicial. The responsibility of each branch is no less than in the many cases prohibiting discrimination in public recreational facilities, e.g., *Watson* v. *City of Memphis*, 373 U. S. 562; *Holmes* v. *City of Atlanta*, 350 U. S. 879; *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U. S. 971.

The suit began when the members of the Board of Managers of Baconsfield, who had been enforcing racial discrimination for generations, sued for relief that would enable them to resume the practice. Under Bacon's will, the Board members were appointees of the Mayor and Council of Macon[7] with the sole function of administering the park owned in trust by the City (R. 31). They must be regarded as part of the administration of the City of Macon. See *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 230.

Significantly, the Board of Managers did not sue as a collective entity, but each member sued individually in his capacity as a member of the Board. Presumably, if the

[7] All seven appointees must be white, at least four must be women, and one should be a descendant of Senator Bacon, if possible (R. 30, 31).

Board had sued as a body, it would have been entitled, as a municipal agency, to representation by the City Attorney. Since the principal defendant was the City of Macon, the nonadversary, sham nature of the suit would have been exposed from the beginning if this had occurred. In any event, the Board members suing individually were treated as competent parties.

The involvement of the executive and legislative branches of City government is evident also. In the first instance, the City failed to exercise its control over its own litigation by preventing the suit altogether. As defendant, the City put up the weakest kind of defense. It did not even suggest to the Superior Court that the Board members, suing individually, lacked the capacity to represent an agency of the City (R. 47). At no time did the City raise any objections, constitutional or otherwise, to the transfer of its public park to other trustees (R. 49). Eventually, the City, acting through its Mayor and Council, caved in completely, voluntarily submitting its resignation (R. 94), and joining in the plaintiffs' request that the new trustees be appointed so that Negroes could be excluded again from Baconsfield (R. 76).

Undoubtedly the City could have prevented the result brought about by this suit. Several municipalities have received gifts from private donors mandating racial discrimination in the use of the property transferred. Faced with the conflict between the terms of the gift and the requirements of the Constitution, they have continued to use donated resources and ignored governmentally unenforceable limitations rather than devise schemes for private discriminatory operation.[8] In the *Girard College Case,* where

[8] The City of Charlotte purchased the reversionary interest from the heirs of a testator who required racial discrimination, so that the City could continue to provide recreational facilities for its

the Board of Directors of City Trusts was a statutory body with independent power to sue, the City of Philadelphia and the State of Pennsylvania entered the suit through their official counsel, respectively, on the side of the Fourteenth Amendment, 353 U. S. 230. By contrast, the Mayor and the Council of the City of Macon bear direct, if not primary, responsibility for the racial discrimination brought about by this suit.

The responsibility of Georgia's judiciary is apparent on the surface. Two of Georgia's courts held that the discriminatory terms of a private instrument must be given effect, despite the Fourteenth Amendment, to insure the exclusion of Negroes from a place of public accommodation. It is submitted that this result was foreclosed by *Shelley* v. *Kraemer*, 334 U. S. 1.

In many ways, state involvement was less clear in *Shelley* than here. In *Shelley*, the instrument containing the discriminatory clause was an agreement between private parties, in which the state had no part. The lawsuit in *Shelley* represented a genuine controversy between private parties—Negroes who wanted to maintain their home and other home owners who wanted to secure the exclusion of Negroes from the neighborhood, a putative right obtained in the bargaining process. Finally, the subject of the lawsuit in *Shelley* was a private home, rather than a place of public accommodation.

In this case, the racial limitation was encouraged by, imposed upon, and accepted by the state. Section 69-504 of the Georgia Code invited Senator Bacon to restrict use

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citizens, *Leeper* v. *Charlotte Park and Recreation Comm'n*, 2 Race Rel. L. Rep. 411 (Super. Ct. Mecklenburg County 1957), even though the racial limitation had been held valid, *Charlotte Park and Recreation Comm'n* v. *Barringer*, 242 N. C. 311, 88 S. E. 2d 114 (1955), cert. denied, 350 U. S. 983.

of the park to the women and children of one race.[9] The limitation was accepted and enforced by the City and its agents for many years, including several years following this Court's decision in the *Girard College Case*. In the spring of 1963, a turning point for civil rights in this country, Negroes were allowed to use the recreational facilities of Baconsfield because the City recognized that overt enforcement of discrimination by the state would no longer be tolerated. But City officials promptly went to court and asked that private trustees be substituted so that discrimination could be reintroduced under private supervision.

Whether the original proponents be viewed as City agents or the City itself, it was an instrumentality of the state that sought judicial enforcement of discrimination in this case. Cf. *Lombard* v. *Louisiana*, 373 U. S. 267, where an official policy of segregation in restaurants was held to invalidate trespass convictions of Negroes who challenged that policy. It is of minor importance that the racial limitation on use of Baconsfield can be traced to an individual owner of private property. That was true in the first *Girard College Case*, 353 U. S. 230, where it was held that the policy could not be enforced by a state agency.[10] It was also true in *Shelley* v. *Kraemer*. Moreover, this Court held in *Peterson* v. *City of Greenville*, 373

[9] See pp. 18-20, *infra*.

[10] In the second *Girard College Case*, the Supreme Court of Pennsylvania approved the appointment of private trustees to continue discriminatory operation. *Estate of Stephen Girard*, 391 Pa. 434, 138 A. 2d 844 (1958), appeal dismissed and cert. denied, 357 U. S. 570. Petitioners challenge the correctness of the ruling of the Supreme Court of Pennsylvania. This Court's refusal to review may be read in the light of the possible availability of relief for the Negro plaintiffs in the courts of Pennsylvania under Pa. Stat. Ann., tit. 18, §4654, forbidding racial discrimination in "primary and secondary schools, high schools, academies, colleges and universities, extension courses and all educational institutions under the supervision of this Commonwealth. . . ."

U. S. 244, that there are times when the private role in originating officially enforced policies of discrimination will not be considered. See also *Lombard* v. *Louisiana*, 373 U. S. 267 and *Robinson* v. *Florida*, 378 U. S. 153.

Nor is it important that the private heirs of Senator Bacon joined with the members of the Board of Managers in the request for enforcement of the restriction in Bacon's will. They did so only as an afterthought, and they were represented by the same attorneys as the Board members. Thus their interests must have been identical with those of the Board members. See American Bar Association, *Canons of Professional Ethics*, No. 10.

Finally, it should be noted that the courts of Georgia refused to apply the doctrine of cy pres. Under this doctrine, which is firmly established in Georgia as a means of effectuating a testator's charitable intent, see Ga. Code Ann. §108-202; *Creech* v. *Scottish Rite Hosp. for Crippled Children*, 211 Ga. 195, 84 S. E. 2d 563 (1954), the Superior Court could have ensured the maintenance of a public park, permitted white persons to continue using it, and retained City administration by refusing to appoint new trustees. Instead it chose the course which would permit racial discrimination. Compare *Guillory* v. *Administrators of Tulane University*, 212 F. Supp. 674, 687 (E. D. La. 1962) (administrators under discriminatory will allowed to desegregate); *Rice University* v. *Carr*, 9 Race Rel. L. Rep. 613 (D. C. Harris County, Tex. 1964), appeal dismissed, No. 14,472, Tex. Ct. Civ. App., February 4, 1965 (same).

II.

The State of Georgia and the City of Macon Are So Involved in the Operation of Baconsfield as to Invalidate Under the Fourteenth Amendment Any Enforcement of the Racially Discriminatory Terms of Senator Bacon's Will.

As this Court held in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722, discrimination by private entities is invalid under the Fourteenth Amendment if "to some significant extent the State in any of its manifestations has been found to have become involved in it." In *Burton* and in *Turner* v. *City of Memphis*, 369 U. S. 350, this reasoning was held to justify injunctive relief against the institutions practicing discrimination. In *Peterson* v. *City of Greenville*, 373 U. S. 244, the same reasoning was applied to invalidate criminal trespass convictions, where a local ordinance required discrimination by private restaurateurs. See also *Lombard* v. *Louisiana*, 373 U. S. 267; *Robinson* v. *Florida*, 378 U. S. 153. It is submitted that the involvement of the State of Georgia and the City of Macon in the operation of Baconsfield invalidates the result reached in this case.

One factor meriting serious consideration under this heading is the fact that racial discrimination has been enforced by each department of government, as pointed out in the previous argument. Another factor of significance is the continuous ownership and operation of Baconsfield on a discriminatory basis for a substantial length of time. It is settled under the first *Girard College Case* that continued operation by municipal authorities would make further exclusion of Negroes impossible. The question now presented is whether it is possible to wipe away the effects of city administration merely by appointing new trustees.

According to Bacon's will, the Board of Managers was given "complete and unrestricted control and management of the said property with power to make all needful regulations for the preservation and improvement of the same . . . " (R. 31). Bacon provided funds for

> the management, improvement and preservation of said property, including when possible drives and walks, casinos and parlors for women, playgrounds for girls and boys and pleasure devices and conveniences and grounds for children, flower yards and other ornamental arrangements . . . (R. 32).

He expressed the hope that the Board of Managers would preserve his two houses (R. 33) and "the present woods and trees" on the property (R. 34). In the years of their administration the City and the Board of Managers have exercised the discretion granted them. They have decided what types of facilities to provide, what buildings to preserve and for what purposes, and whether to alter the landscape. The City was in control during the years when Baconsfield took shape as an institution open to the public. The effects of its administration remain.

A fact of critical importance in this case is the State of Georgia's responsibility for the original restriction of Baconsfield to a distinct racial group. Section 69-504 of the Georgia Code, enacted in 1905, well before Bacon published his carefully drafted will, provides:

> Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the

> use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property.

Many choices were offered to donors. Lands could be dedicated to the exclusive use of the white race, the colored race, or any other race, or the women and children of the white race, the colored race, or any other race. But no choice was offered for those who might have preferred to endow an integrated park.

The Supreme Court of Georgia held in this case that §69-504 did not require that gifts be limited racially (R. 142), but no such construction was in existence to guide testators and their attorneys in 1911 when Bacon wrote his will. Men are careful to conform to the letter of the law when preparing their wills. This statute was passed during the time when segregation laws were sweeping the South, see Woodward, *The Strange Career of Jim Crow*, Ch. II (1957), and its words revealed a separatist intent. The unhappy fate of pre-Civil War testamentary trusts for the emancipation or resettlement of slaves stood as a warning to any who might depart from the explicit directions of the statute. See *Adams* v. *Bass*, 18 Ga. 130 (1855); *American Colonization Society* v. *Gartrell*, 23 Ga. 448 (1858).

The rule of *Peterson* v. *City of Greenville*, 373 U. S. 244 and *Robinson* v. *Florida*, 378 U. S. 153 applies. The State

of Georgia suggested that Senator Bacon limit his gift to one of several racial classes, and he did so, following the words of the statute very closely (R. 30). In these circumstances, Senator Bacon's personal motives—explicitly set forth at some length in his will (R. 32-33)—are of no consequence; "a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators." *Peterson* v. *City of Greenville*, 373 U. S. 244, 248. Georgia expressly authorized racial restrictions in §69-504 and, in a companion statute, §69-505, offered enforcement of them through the police power.[11] See *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 726 (Stewart, J., concurring).

Reinforcing these statutes, the law of Georgia has for many years conditioned tax exemption on the existence of segregation. At least since 1877, the Constitution has authorized exemption from taxation for "all institutions of purely public charity." Ga. Const. 1877, art. 7, sec. 2, par. 1, Ga. Code Ann. §2-5002. In 1918 an amendment to the Constitution included a proviso that "all endowments to institutions established for white people, shall be limited to white people, and all endowments to institutions established for colored people, shall be limited to colored people; . . ." Editorial note, Ga. Const. 1877, art. 7, sec. 2, par. 1, Ga.

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[11] Ga. Code Ann. §69-505 provides:

Municipality authorized to accept.—Any municipal corporation, or other persons natural or artificial, as trustees, to whom such devise, gift, or grant is made, may accept the same in behalf of and for the benefit of the class of persons named in the conveyance, and for their exclusive use and enjoyment; with the right to the municipality or trustees to improve, embellish, and ornament the land so granted as a public park, or for other public use as herein specified, and every municipal corporation to which such conveyance shall be made shall have power, by appropriate police provision, to protect the class of persons for whose benefit the devise or grant is made, in the exclusive used and enjoyment thereof.

Code Ann. §2-5002. This exemption and proviso were carried over into the statute setting forth tax exemptions, Ga. Code Ann. §92-201, and readopted in the Georgia Constitution of 1945, art. 7, sec. 1, par. 4, Ga. Code Ann. §2-5404.[12]

Tax exemption is always a valuable subsidy, and "may attain significance when viewed in combination with other attendant state involvements." *Eaton* v. *Grubbs*, 329 F. 2d 710 (4th Cir. 1964). Senator Bacon was eager to obtain tax exemption for Baconsfield, providing in his will that a special statute should be sought if tax exemption should be denied (R. 32). In Georgia tax exemption is dependent upon the erection of racial barriers.

The Baconsfield trust, created pursuant to Ga. Code Ann. §69-504, is but one of several types of charitable trusts to which the State extends support in numerous ways in addition to tax exemption. See Ga. Code Ann. §108-203. The courts of Georgia have often remarked that charitable trusts are looked upon with special favor. See, e.g., *Simpson* v. *Anderson*, 220 Ga. 155, 137 S. E. 2d 638 (1964); *Goree* v. *Georgia Industrial Home*, 187 Ga. 368, 200 S. E. 684 (1938) and cases cited; *Beckwith* v. *Rector, etc., of St. Philip's Parish*, 69 Ga. 564 (1882). The statutes of Georgia reflect this solicitude, providing for the enforcement of charitable trusts in equity, Ga. Code Ann. §108-201, the effectuation of the testator's intent under the cy pres

[12] In *Emory University* v. *Nash*, 218 Ga. 317, 127 S. E. 2d 798 (1962), the Supreme Court of Georgia held that the proviso on racial limitation could not be applied to deprive a desegregated university of its tax exemption because the racial proviso was inconsistent with another proviso stipulating that tax exemption should only apply to "such colleges, incorporated academies or other seminaries of learning as are open to the general public," Ga. Code Ann. §92-201. However, because there is no conflicting statute requiring that tax exempt parks be open to the general public, Georgia's law continues to condition tax exemption of parks on the maintenance of racial limitations.

doctrine, §108-202, and continuous supervision by equity courts, §108-204. Particular favoritism is extended to charitable trusts in §§108-206 through 108-209, which lay down rules of procedure and construction directed toward upholding the validity of attempted charitable trusts. Charitable, or public, trusts are enforced in the courts by the Attorney General or the solicitor general of the circuit in which the trust corpus lies. Ga. Code Ann. §108-212 (1963 Supp.).

One of the many ways the State of Georgia supports charitable trusts is by extending them immunity from suit in certain tort situations. Under the present rule, an institution's charitable assets cannot be recovered by a person claiming negligence of the institution's employees. *Morehouse College* v. *Russell,* 219 Ga. 717, 135 S. E. 2d 432 (1964); *id.,* 109 Ga. App. 301, 136 S. E. 2d 179 (1964); *Cox* v. *De Jarnette,* 104 Ga. App. 664, 123 S. E. 2d 16 (1961); *Morton* v. *Savannah Hospital,* 148 Ga. 438, 96 S. E. 887 (1918). Noncharitable assets, such as money received for services or a liability insurance policy, can be recovered by one suing under *respondeat superior,* and all assets are subject to recovery for administrative negligence, or the torts of the institution as opposed to its employees. *Ibid.* Nonetheless, Georgia continues to offer charitable enterprises a substantial degree of immunity from suit, with very little doctrinal change having occurred in the last fifty years. See *Morton* v. *Savannah Hospital, supra.*

Georgia has a comparable doctrine of immunity from suit for municipalities where a governmental function is being performed. Ga. Code Ann. §69-301. It has been held that maintaining a park is a governmental function, so that the municipality is immune from liability for the acts of its officers or employees in connection with the park. *Stubbs* v. *City of Macon,* 78 Ga. App. 237, 50 S. E. 2d 866 (1948);

Jones v. *City of Atlanta*, 35 App. 376, 133 S. E. 521 (Ga. Ct. App. 1926).

Another incident of charitable trusts in Georgia, illustrating the support offered them by the state and their similarity to governmentally owned and operated institutions, is perpetual existence. Georgia retains in its law of private, or noncharitable, trusts, the traditional rule against perpetuities limiting their duration to "lives in being . . . , and 21 years, and the usual period of gestation added thereafter." Ga. Code Ann. §85-707. However, the rule against perpetuities does not apply to charitable trusts. *Regents of University System* v. *Trust Company of Georgia*, 186 Ga. 498, 512, 198 S. E. 345 (1938); *Murphy* v. *Johnston*, 190 Ga. 23 (7), 8 S. E. 2d 23 (1940); *Pace* v. *Dukes*, 205 Ga. 835, 55 S. E. 2d 367 (1949). In the case of Baconsfield, perpetual existence is guaranteed by §69-504.

This element of perpetual existence is a factor of major significance. It is axiomatic that a man has a right to exercise his prejudices in the use of his private property during his life, and to dispose of his property by will, making irrational choices about its recipients and uses. But no man has the right to control his property through eternity. The law sets temporal limits on testamentary encumbrances, and in the exceptional situation of the charitable trust it exercises close supervision. In this case Georgia has not only given Bacon's trust perpetual existence, but has exercised its broad powers to assure the maintenance of segregation to the end of time.

It has been shown that charitable trusts—whether the trustees be public or private—are carefully nurtured by the State of Georgia, as by other states. The reason the state fosters these institutions to such a degree lies in the fact that charitable trusts perform many functions often

performed by the state. See Clark, *Charitable Trusts, the Fourteenth Amendment, and the Will of Stephen Girard,* 66 Yale L. J. 979, 1010 (1957). As an example, Baconsfield, established under a charitable trust, serves as a public recreational facility for some of the citizens of Macon. The provision of recreational facilities is a public function under the laws of Georgia. Ga. Code Ann. §§69-601 through 69-616 authorizes municipalities to set aside existing public property or acquire new property for use as parks, playground and recreation centers.

Thus Baconsfield was set up under one of several governmentally developed methods of providing public parks. The Constitution forbids racial restrictions in public facilities established by government; it would be anomalous if public parks set up under other, equally effective, governmentally fostered plans could be so restricted. In analogous situations, the Fourth Circuit has held that medical facilities operated by private groups under comprehensive state plans to provide health facilities for all citizens are subject to the nondiscrimination requirements of the Fourteenth Amendment. *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 929 (4th Cir. 1963), cert. denied, 376 U. S. 938; *Eaton* v. *Grubbs,* 329 F. 2d 710 (4th Cir. 1964). Cf. *Smith* v. *Allwright,* 321 U. S. 649, *Terry* v. *Adams,* 345 U. S. 461.

Indeed, this Court's decision in *Marsh* v. *Alabama,* 326 U. S. 501 requires the desegregation of Baconsfield. Since the company town in *Marsh* was like any other town in all respects except ownership, the commands of the Fourteenth Amendment were held to be applicable. Apart from its previous ownership, Baconsfield is no different from any other public park.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of Supreme Court of Georgia

IN THE SUPREME COURT OF GEORGIA
22534

Decided Sept. 28, 1964

209

EVANS *et al.* v. NEWTON *et al.*

The record does not support the contentions of the plaintiffs in error, and the judge could not properly have gone beyond the judgment rendered. The judgment is not shown to be erroneous for any of the reasons urged by counsel for the plaintiffs in error.

The will of A. O. Bacon (which was probated in solemn form) in Item Nine gave in trust described property, to be known as "Baconsfield", to named trustees for the benefit of his wife and two named daughters for their joint use, benefit, and enjoyment during the term of their natural lives. It was provided that upon the death of the last survivor, the property, including all remainders and reversions, "shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control" of a board of managers consisting of seven persons, not less than four to be white women and all seven to be white persons. In order to provide for the maintenance of the park, income from described real property and bonds was to be expended by the board of managers.

Opinion of Supreme Court of Georgia

Charles E. Newton and others, as members of the Board of Managers of Baconsfield, brought an equitable petition against the City of Macon (in its capacity as trustee under Item Nine of the will of A. O. Bacon), and Guyton G. Abney and others, as successor trustees under the will holding assets for the benefit of certain residuary beneficiaries. It was alleged: The city as trustee holds the legal title to a tract of land in Macon, Bibb County, known as Baconsfield, under Item Nine of the will of A. O. Bacon. As directed in the will, the board through the years has confined the exclusive use of Baconsfield to those persons designated in the will. The city is now failing and refusing to enforce the provisions of the will with respect to the exclusive use of Baconsfield. Such conduct on the part of the city constitutes such a violation of trust as to require its removal as trustee. It was prayed that: the city be removed as a trustee under the will; the court enter a decree appointing one or more freeholders, residents of the city, to serve as trustee or trustees under the will; legal title to Baconsfield and any other assets held by the city as trustee be decreed to be in the trustee or trustees so appointed for the uses originally declared by the testator; and for further relief.

The City of Macon filed its answer asserting that it cannot legally enforce racial segregation of the property known as Baconsfield, and therefore it is unable to comply with the specific intention of the testator with regard to maintaining the property for the exclusive use, benefit, and enjoyment of the white women, white girls, white boys, and white children of the city. The city prayed that the court construe the will and enter a decree setting forth the duties and obligations of the city in the premises. The other defendants admitted the allegations of the petition and

prayed that the city be removed as a trustee. The petitioners thereafter filed a motion for summary judgment.

Reverend E. S. Evans and others, alleging themselves to be Negro residents of the City of Macon, on behalf of themselves and other Negroes similarly situated, filed an intervention in the cause and asserted: The restriction and limitation reserving the use and enjoyment of Baconsfield Park to "white women, white girls, white boys and white children of the City of Macon," is violative of the public policy of the United States of America and violative of the Constitution and laws of the State of Georgia. The court as an agency of the State of Georgia cannot, consistently with the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and the equivalent provision of the Constitution of the State of Georgia, enter an order appointing private citizens as trustees for the manifest purpose of operating, managing, and regulating public property (which passed to the City of Macon under a charitable trust created by will) in a racially discriminatory manner. Although the charitable devise at the time of its creation was capable of being executed in the exact manner provided by the will, by operation of law it is no longer capable of further execution in the exact manner provided for by the testator. The court should effectuate the general charitable purpose of the testator to establish and endow a public park by refusing to appoint private persons as trustees.

By amendment to the petition it was alleged: By the will of A. O. Bacon a trust was established for his heirs. The trust has been executed as to four of his seven heirs now living, A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks, and M. Garten Sparks. The interests of three remaining heirs, Louise Curry Williams, Shirley

Curry Cheatham, and Manley Lamar Curry, are still held under an executed trust by four trustees holding under the authority of the will, these trustees being Guyton Abney, J. D. Crump, T. I. Denmark, and Dr. W. G. Lee. These seven persons have an interest in the litigation since, if the trust purpose expressed in the will with respect to the designation of persons who may use Baconsfield should fail, the property comprising Baconsfield, together with the property providing the upkeep of Baconsfield, will revert to the estate of A. O. Bacon and be distributed to these heirs. The amendment prayed that the Sparks heirs be allowed to intervene and that the trustees be allowed to assert the interests of the other heirs. It was also prayed that the Negro intervenors and other members of the Negro race resident in Macon be permanently enjoined from entering and using the facilities of Baconsfield. The Sparks heirs and the trustees of the other heirs of A. O. Bacon filed an intervention praying that the relief sought by the original petitioners be granted, but that if such relief not be granted, the property revert to them.

The City of Macon filed an amendment to its answer, alleging that pursuant to resolution adopted by the Mayor and Council of the city at its regular meeting on February 4, 1964, the city has resigned as trustee under the will of A. O. Bacon. It prayed that the resignation be accepted by the court.

The Negro intervenors filed an amendment to their intervention in which they asserted: The equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits the court from enjoining Negroes from the use of the park, and from accepting the resignation of the City of Macon as trustee and apointing new trustees for the purpose of enjoining (enforcing?) the racially dis-

criminatory provision in the will of A. O. Bacon. Code § 69-504 prescribes racial discrimination and is therefore violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Since the racially discriminatory provision in the will was dictated by that unconstitutional statute, enforcement of the racially discriminatory provision is constitutionally prohibited. Code § 108-202, properly construed, requires that the racially discriminatory provision in the will be declared null and void. The intervenors prayed that the court withhold approval of the attempted resignation of the city as trustee under the will, direct the city to continue to administer the park on a racially nondiscriminatory basis, and deny the injunction sought by the petitioners to exclude Negroes from the use of the park.

On March 10, 1964, the judge of the superior court entered an order and decree in the case which adjudged as follows: (1) The intervenors named are proper parties in the case and are proper representatives of the class which their intervention states that they represent, the Negro citizens of Bibb County and the City of Macon. (2) The defendants, Guyton G. Abney, J. D. Crump, T. I. Denmark, and Dr. W. G. Lee, as successor trustees under the will of A. O. Bacon, and intervenors A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks are also proper parties. (3) The City of Macon having submitted its resignation as the trustee of the property known as Baconsfield, the resignation is accepted by the court. (4) Hugh M. Comer, Lawton Miller, and B. L. Ragister are appointed as trustees to serve in lieu of the City of Macon. (5) The court retains jurisdiction for the purpose of appointing other trustees that may be necessary in the future. (6) It is unnecessary to pass upon the

secondary contention of the intervenors Guyton G. Abney and others.

Reverend E. S. Evans and others in their writ of error to this court assign error on this order of the trial judge. Their contentions will appear from the opinion.

ALMAND, Justice. Counsel for the plaintiffs in error (the Negro intervenors) assert that the decree of the judge of the superior court was "patent enforcement of racial discrimination contrary to the equal protection clause of the Fourteenth Amendment" to the Federal Constitution. The decree did not enforce, or purport to enforce, any judgment, ruling, or decree as related to the intervenors. After determining that all parties were properly before the court, the decree did two things: (1) Accepted the resignation of the City of Macon as trustee of Baconsfield, and (2) appointed new trustees.

"The law of charities is fully adopted in Georgia . . ." Jones v. Habersham, 107 U. S. 174(5). Under the law of this State any person may, by will, grant, gift, deed, or other instrument, give or devise property for any charitable purpose. Ga. L. 1937, p. 593 (Code Ann. 108-207). Any public convenience might be a proper subject for a charitable trust. Code 108-203. A charity once established is always subject to supervision and direction by a court of equity to render effectual its purpose. Code 108-204. It is the rule that a charitable trust shall never fail for the want of a trustee. Code 108-302.

Whether the will of A. O. Bacon, establishing a trust for the operation of Baconsfield, contemplated by the language "to the Mayor and Council of the City of Macon and *to their* successors [italics ours]" that the named trustee might resign, need not be determined. The City of Macon did resign, and the judge of the superior court was con-

fronted with the commandment of Code 108-302 that a trust shall never fail for the want of a trustee. Being empowered to appoint trustees when a vacancy occurs for any cause (Thompson v. Hale, 123 Ga. 305, 51 S E 383; Harris v. Brown, 124 Ga. 310(2), 52 S E 610; Woodbery v. Atlas Realty Co., 148 Ga. 712, 98 S E 472; Sparks v. Ridley, 150 Ga. 210(3), 103 S E 425), the judge exercised such power and appointed successor trustees.

The contention by counsel for the plaintiffs in error that Code 69-504 required A. O. Bacon to limit the use of Baconsfield to the members of one race cannot be sustained. Code 69-504, in providing for gifts limited to members of a race, simply states that any person *may* "devise, give, etc." The law of Georgia does not by Code 69-504, nor by any other statutory provision, require that any testator shall limit his beneficence to any particular race, class, color, or creed. Such limitation, however, standing alone, is not invalid, and this Court has sustained a testamentary charity naming trustees for establishing and maintaining "a home for indigent colored people 60 years of age or older residing in Augusta, Georgia." Strother v. Kennedy, 218 Ga. 180 (127 SE2d 19). A. O. Bacon had the absolute right to give and bequeath property to a limited class.

Counsel for the plaintiffs in error assert that: "As the City was unable to comply with the racially discriminatory direction of the trust, three alternatives were open to the lower court: (1) declare the racially discriminatory provision null and void; (2) remove the trustee (or accept its resignation) and appoint a non-governmental trustee; (3) declare failure of the trust." They insist that the judge should have chosen the first alternative.

Counsel for plaintiffs in error assert that the court should have applied the provisions of Code 108-202 that

when a valid charitable bequest is incapable for some reason of exact execution in the exact manner provided by the testator a court of equity will carry it into effect in such way as nearly as possible to effectuate his intention. The answer to this contention is: the application of the cy pres rule, as provided in this code section, was not invoked by the primary parties to this case, and even if it be conceded (which we do not concede, see Smith v. Manning, 153 Ga. 209, 116 S E 813 and Fountain v. Bryan, 176 Ga. 31, 166 S E 766) that the intervenors could raise such issue, the facts before the trial judge were wholly insufficient to invoke a ruling that the charitable bequest was or was not incapable for some reason of exact execution in the exact manner provided by the testator. There is no testimony in the record of any nature or character that the board of managers provided by the will cannot operate the park pursuant to the terms and conditions of the will.

Counsel for the plaintiffs in error cite Pennsylvania v. Board of Directors of City Trust of the City of Philadelphia, 353 U. S. 230. In the Pennsylvania case the United States Supreme Court pointed out that the board which operated Girard College was an agency of the State of Pennsylvania by legislative act, and that the refusal to admit Negroes to Girard College was therefore discrimination by the State. Upon the return of the case to the Supreme Court of Pennsylvania for further proceedings not inconsistent with the opinion, that court remanded the case to the Orphans' Court for further proceedings not inconsistent with the opinion of the Supreme Court of the United States. The Supreme Court of Pennsylvania, on the second appearance of the case (see Girard College Trusteeship, 391 Pa. 434), stated that the Orphans' Court construed the United States Supreme Court's opinion to mean

that the Board of City Trusts was constitutionally incapable of administering Girard College in accordance with the testamentary requirements of the founder, and the Orphans' Court entered a decree removing the Board as trustee of Girard College and substituting therefor thirteen private citizens, none of whom held any public office or otherwise exercised any governmental power under the Commonwealth of Pennsylvania. The Supreme Court of Pennsylvania affirmed this action on review, and again sustained action denying admission to Girard College by the Negro applicants. Counsel for the defendants in error cite Girard College Trusteeship, 391 Pa. 434, and strongly rely on this Pennsylvania case. (On review by the United States Supreme Court the motion to dismiss was granted, and treating the record as a petition for certiorari, certiorari was denied. Pennsylvania v. Board of Directors of City Trust of Pennsylvania, 357 U. S. 570. A motion for rehearing was denied. 358 U. S. 858.) In so far as the Girard College Trusteeship case is applicable on its facts to the present case, it supports the rulings we have made.

The record does not sustain the contentions of the plaintiffs in error, and the judge could not properly have gone beyond the judgment rendered. This judgment is not shown to be erroneous for any of the reasons urged by counsel for the plaintiffs in error.

Judgment affirmed. All the Justices concur.

Judgment of Supreme Court of Georgia

SUPREME COURT OF GEORGIA

Atlanta, September 28, 1964

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

E. S. Evans et al. v. Charles E. Newton et al.

This case came before this court upon a writ of error from the Superior Court of Bibb County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

Order of Supreme Court of Georgia Denying Rehearing

SUPREME COURT OF GEORGIA

Atlanta, October 8, 1964

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

E. S. Evans et al. v. Charles E. Newton et al.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Letter Opinion of Superior Court of Bibb County

STATE OF GEORGIA
SUPERIOR COURTS OF THE MACON JUDICIAL CIRCUIT
MACON, GEORGIA

Chambers of:

OSCAR L. LONG
HAL BELL
W. D. AULTMAN
Judges

March 10, 1964

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Re: Charles E. Newton, et al. v.
The City of Macon, et al.,
No. 25864, Bibb Superior Court.

Gentlemen:

After careful consideration of the Motion for Summary Judgment in the above stated case, I have reached the following conclusions.

Letter Opinion of Superior Court of Bibb County

The racial limitation in Senator A. O. Bacon's will is not unlawful for any reason as contended by the intervenors, Reverend E. S. Evans, et al.

The inability of the City of Macon, as Trustee, to apply constitutionally the racial criterion prescribed by the testator for use of the property as a park for white women and white children affected the trustee and not the trust, and the City having tendered its resignation as trustee, it is proper that the Court accept the resignation and appoint private trustees who can carry out the purpose and intent of the testator as set forth in the will.

It is my opinion that the doctrine of Cy Pres cannot be applied to Baconsfield. There is no general charitable purpose expressed in the will. It is clear that the testator sought to benefit a certain group of people, i.e., "the white women, white girls, white boys and white children of the City of Macon", and it is clear that he sought to benefit them only in a certain way, i.e., by providing them with a park or playground. Senator Bacon could not have used language more clearly indicating his intent that the benefits of Baconsfield should be extended to white persons only, or more clearly indicating that this limitation was an essential and indispensable part of his plan for Baconsfield.

The Court has, therefore, this day signed and filed with the Clerk of this Court an order and decree, a copy of which is herewith enclosed.

Yours truly,

/s/ O. L. Long

OLL:ese

CC: Mr. Romas Ed Raley, *Clerk*
Bibb Superior Court
Macon, Georgia

Order of Superior Court of Bibb County

No. 25864

Bibb Superior Court

Bill in Equity

Charles E. Newton, *et al.*

v.

City of Macon, *et al.*

Order and Decree

The Motion for Summary Judgment filed in behalf of petitioners in the above captioned matter having come on regularly to be heard, and the Court having duly considered all pleadings filed in behalf of all parties to said cause and the briefs filed in behalf of petitioners and the intervenors Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, it is

Considered, ordered and adjudged as follows:

(1) The intervenors named above are proper parties to this case and are proper representatives of the class which their intervention states they represent, to-wit, the negro citizens of Bibb County, Georgia, and the City of Macon, Georgia.

(2) The defendants Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee, as successor Trustees under the Last Will and Testament of Augustus Octavius Bacon, deceased, are also proper parties to the case, as are the

intervenors A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks.

(3) The defendant the City of Macon having submitted its resignation as Trustee of the property described in the petition and known as Baconsfield, said resignation is hereby accepted by the Court.

(4) Under the principle that a trust shall not fail for want of a trustee it becomes the duty of this Court to appoint new trustees to serve in lieu of the City of Macon; and the following, all being citizens and residents of Bibb County, Georgia, are hereby appointed as Trustees, to-wit, Hugh M. Comer, Lawton Miller and B. L. Register.

(5) The Court hereby retains jurisdiction for the purpose of appointing another trustee or trustees in the event any of the persons named above fails to accept his appointment or in the event of the future death, incompetency or other cause whereby any or all of such Trustees fail or cease to act as such.

(6) Since the relief herein granted is also that primarily sought by the defendants Guyton G. Abney, et al., as Trustees under the Last Will and Testament of Augustus Octavius Bacon and by intervenors A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks, it is therefore unnecessary to pass upon and the Court does not pass upon the secondary contentions outlined in paragraph 5 of the amendment to the answer and cross bill filed by Guyton G. Abney, et al., as Trustees and in paragraph 6 of the petition for intervention filed by the above named intervening heirs.

So ordered, this the 10th day of March, 1964.

/s/ O. L. Long
J.S.C.M.C.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 959.

E. S. EVANS, et al.,
Petitioners,

v.

CHARLES E. NEWTON, et al.,
Respondents.

BRIEF

In Opposition to Petition for Writ of Certiorari to the Supreme Court of Georgia.

QUESTION PRESENTED.

Here certain land was devised in trust for a park for white persons only. The testator by clear language manifested a disapproval of the idea of any recreation area being open to the members of both the white and negro races. The legal title was to be held by the City of Macon or its successors in said trust, subject to control by a Board of Managers, composed of private citizens selected as provided in the will.

When negro citizens began to use the park's facilities, the Mayor and Council of the City by formal resolution after institution of suit to remove the City as Trustee resolved to resign, declaring it to be "against good conscience" that the City should attempt to remain as title holder to the trust property.

Under these circumstances where the City tenders its resignation as trustee to a court of equity, whether in the midst of litigation seeking its removal or otherwise, is it a denial of constitutional rights of negro citizens of the community for the court to appoint successor trustees and to refuse to command the City to continue to serve where it is argued on behalf of these negro citizens that only by retaining the City as trustee can it be assured that both races will have access to the park area?

STATEMENT.

Respondents, members of the Board of Managers of Baconsfield, incorporate by reference the statement of the case contained in the opinion of the Supreme Court of Georgia and set out in the appendix of the Petition for Writ of Certiorari.

These respondents wish to make certain additions to that statement as follows:

A. O. Bacon was a soldier in the service of the Confederate States of America and for nearly twenty (20) years a United States Senator from Georgia. The following quoted excerpts from Item Ninth of his will are most relevant to the present inquiry (R. 30-33).

> ". . . it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong

to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided for; the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized. For the control, management, preservation and improvement of said property there shall be a Board of Managers consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons. The Members of this Board shall first be selected and appointed by the Mayor and Council of the City of Macon, or by their successors in said trust; and all vacancies in said Board shall be filled by appointments made by the Mayor and Council of the City of Macon, or their successors, upon nomination made by the said Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors. If practicable, I desire that there shall be as a member of said Board of Managers at least one male or female descendent of my own blood, not only in the Board as at first constituted, but at all times thereafter. The said Board of Managers shall at all times have complete and unrestricted control and management of the said property, with power to make all needful regulations for the preservation and improvement of the same, and rules for the use and enjoyment thereof, with power to exclude at any time any person or persons of either sex, who may be deemed objectionable . . . "

". . . I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection."

"I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common."

In accordance with the foregoing quoted provisions of the will of A. O. Bacon the City of Macon until its resignation was the passive title holder, and the Board of Managers created by Mr. Bacon exercised those powers and fulfilled those obligations bestowed by the testator.

Contrary to what was stated to be a presumption at the bottom of page 12 of the Petition for Writ of Certiorari the Board of Managers has never been regarded by itself or by the City as an agency of the City or as a body entitled to the services of the City Attorney. Over the years the Board has always employed private counsel, in fact, members of the law firm representing it in the present litigation. Petitioners attach significance to the fact that the Board sued as individuals rather than as a body. See pages 12 and 13 of the Petition. The State of Georgia having granted the Board no corporate status nor given it any power to sue as a unit, the Board being only a creation of the testator could only sue as individual fiduciaries, just as does any other trustee, to comply with their obligation to control and manage the trust corpus in accordance with the terms of the will.

At the direction of the testator the Mayor and Council as trustee appointed the original Board and have "ap-

proved'' the Board's ''nomination'' of persons to fill vacancies in its membership when they occurred. (See again the will provision in this regard, supra.) Presumably, it is for this reason that petitioners insist that the Board as constituted at the time it instituted suit was a state agency.

Respondent Board members deny that the Board as constituted at the outset of this litigation could be meaningfully viewed as a state or governmental agency. Further, after the resignation of the City and the appointment of new trustees by the Superior Court of Bibb County, Georgia, the Board serving at that time resigned (R. 115), and the three new trustees thereupon appointed a Board of seven persons of whom four had not served on the Board at any previous time (R. 116).

Members of the Board of Managers have always served without compensation.

The following are excerpts from the Resolution of the Mayor and Council of the City of Macon dated February 4, 1964 and attached to the pleading by which the City sought to have the Superior Court of Bibb County accept its resignation as trustee of Baconsfield (R. 92-93):

> ''Whereas the Mayor and Council are greatly concerned that if Baconsfield is not operated and maintained in accordance with all of the provisions of the will of Senator Bacon, the property may revert to private persons who are heirs at law of or legatees under the will of Senator Bacon, in which case Baconsfield would become commercial or residential property or property of a nature wherein no part of the public would have the enjoyment of the property contemplated by Senator Bacon; and . . .''
>
> ''. . . Whereas, it is the considered opinion of the Mayor and Council that it is against good conscience for the City of Macon to continue to serve as trustee

under said will under circumstances where as such trustee it cannot carry out the plain and unambiguous terms of the trust; and . . ."

". . . Whereas, under certain decisions of the Federal Courts the City of Macon has realized that it could not as a municipal corporation carry out all of said provisions; and . . ."

Having made the foregoing statement of facts, respondents now comment briefly on certain assertions in the statement of petitioners lest their acquiescence therein be construed as agreement.

Respondents submit that the two "Questions Presented" as outlined on page 2 of the Petition contain assertions of fact and statements of conclusions not supported by the record or by the facts as they exist. In regard to the first Question respondents show that the City of Macon did not petition a court of equity. It merely tendered its resignation as trustee in pending litigation instituted against it. Petitioners in that Question refer to the Superior Court of Bibb County as appointing new trustees for the purpose of excluding Negroes from the park. The facts of the case show only that the Court found a trust without a trustee and exercised the very normal duty of appointing one. Since shortly after Jarndyce v. Jarndyce (Dickens' **Bleak House**) courts of equity have not made a practice of compelling unwilling trustees to serve, nor have the courts embarked upon the continuous course of supervision which is necessary where a trustee is in fact unwilling. Any assertion beyond that as to any motivation on the part of the Superior Court of Bibb County is a mere matter of conjecture.

The first Question further refers to the City as administering the park through the Board of Managers. Yet Mr. Bacon's will bestows all the powers of management upon the Board (R. 31). There is nothing in the record to indicate that the City as trustee ever usurped any of

those powers. Indeed, such is not the case. Rather, the Board has at all times made policy and exercised control.

There is also a reference to Negroes being "allowed" to use the park. That phrase would not be accurate if construed to denote an express grant of permission. No permission was sought or granted, but rather certain Negro citizens began using the facilities of the park.

Perhaps the characterization of Baconsfield as a "public" park begs the question.

With regard to the second Question on page two of the Petition for Writ of Certiorari, respondents deny that Georgia statutes properly construed condition tax exemption on the maintaining of racial "segregation" with regard to a charitable trust such as Baconsfield. Further, it is the Board of Managers rather than the City of Macon which has "administered" the park.

On page 8 of the Petition it is stated that no evidentiary hearing was held in the Superior Court of Bibb County after respondent Board members moved for a summary judgment. Respondents based their motion solely on the pleadings in the belief that no evidence was necessary to illuminate the issues. Under Chapter 110-12, Georgia Code Annotated (Acts 1959, pp. 234-236) upon the filing of such a motion seeking a judgment on the pleadings any party who feels that factual issues should be raised may file affidavits and depositions. Petitioners intervened in Bibb Superior Court on May 29, 1963. That Court entered its order granting respondents a summary judgment on March 10, 1964. At no time during the interim did counsel for those who are petitioners here express any desire to take evidence. It was therefore quite proper for the Superior Court to rule on the motion on the basis of the pleadings before it.

QUESTIONS NOT PREVIOUSLY RAISED.

The Petition for Writ of Certiorari at pages 13 and 14 discusses at some length the responsibility of the Mayor and the Council of the City of Macon for alleged acts of discrimination. No such question was raised by petitioners in the Superior Court of Bibb County or in the Supreme Court of Georgia, but rather the record is entirely silent as to any such issue. Respondents respectfully submit that petitioners may not properly raise this issue for the first time in their Petition for Writ of Certiorari.

Petitioners set out on pages 3 and 4 of their Petition Georgia Code Sections 2-5404 and 92-201, which petitioners contend condition the tax exemption of charitable trusts on racial separation. On page 20 they set out Georgia Code Section 69-505 in a footnote. None of these three statutes or any issue concerning them was mentioned by petitioners in the Superior Court of Bibb County or in the Supreme Court of Georgia, but rather the record is entirely silent as to any contention that any of these statutes is relevant to this case. Petitioners may not properly raise the issues they seek to raise involving these statutes for the first time in their Petition for Writ of Certiorari.

Pages 21 through 24 of the Petition are devoted almost entirely to an argument that certain enumerated Georgia Code Sections from Titles 69, 85 and 108 of that Code bestow upon charitable trusts in Georgia such a governmental nature that such trusts must be regarded as being subject to the inhibitions of the Fourteenth Amendment. The statutes referred to grant perpetual existence, a limited immunity in tort, and certain tax immunity to charitable trusts. Further there are among their number sections providing for supervision of charitable trusts by courts of equity, for enforcement of them by the attorney general, and for the application under proper circumstances of the doctrine cy pres.

No issue concerning the effect of these statutes was made by petitioners either in the Superior Court of Bibb County or in the Supreme Court of Georgia. Petitioners may not properly raise this constitutional question for the first time in their Petition for Writ of Certiorari.

The Supreme Court of the United States has recognized that under Georgia practice federal constitutional questions must be raised at the outset in the superior courts. **Barbour v. State of Georgia**, 249 U. S. 454, 39 S. Ct. 316, 63 L. Ed. 704 (1919), and that such questions must be preserved in the bill of exceptions to the Georgia Supreme Court. **Herndon v. State of Georgia**, 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935). In these cases where a federal constitutional question was not raised in a timely manner or preserved on appeal as required by state law, the Supreme Court of the United States, following a well settled rule of practice, declined review as to the said questions.

REASONS FOR NOT GRANTING THE WRIT.

Respondents submit that this Petition for a Writ of Certiorari should be denied because the case was correctly decided by the Supreme Court of Georgia, and because the decision of that Court does not conflict with any decision of the United States Supreme Court or of any other court, State or Federal, in this land.

Petitioners complain that in the change in the trustee of Baconsfield several different agencies have taken actions denying them certain constitutional "rights". These agencies are the Mayor and Council of the City of Macon which resigned the trust, the Board of Managers which sued the City to force its removal, the Superior Court of Bibb County which accepted the resignation of the City and the State of Georgia whose legislature passed certain statutes complained of by petitioners as fostering racial discrimination.

First of all it is the basic position of these respondents that none of these agencies denied any "rights" of petitioners, since only those persons falling within certain classifications described by Mr. Bacon as persons to be benefited have any "right" to share in his gift. A fortiori petitioners have no standing to complain of a change in trustee.

Having stated this basic position, these respondents will deal further with the issues raised by petitioners as to each of these agencies.

In pointing at alleged instances of state "discrimination" petitioners make the following statement on page 14 of the Petition:

> ". . . By contrast, the mayor and council of the City of Macon bear direct, if not primary, responsibility for the racial discrimination brought about by this suit."

In support of the foregoing assertion petitioners argue in substance that the Mayor and Council of the City of Macon should not have resigned as trustee of Baconsfield, but rather that they should have resisted all efforts at their removal and attempted to continue to serve as trustee ignoring the racial limitation though that limitation is so emphasized by the testator that it may only be viewed as an essential and indispensable part of the trust purpose.

Respondents submit that while petitioners did from the beginning of this litigation point to the Court's acceptance of the City's resignation as a type of action forbidden by the Fourteenth Amendment and did from the beginning complain of certain actions of the Board of Managers, which petitioners insist is a branch of the City, petitioners are now raising for the first time in their Petition for Writ of Certiorari the question of whether or not the Mayor and Council, in resigning rather than resisting further, violated any constitutional rights of petitioners.

Since city action has never been so complained of before, either in the Superior Court of Bibb County or in the Supreme Court of Georgia, the question of any responsibility of the Mayor and Council for racial discrimination is not a question properly before this Court.

Further, whether or not the Mayor and Council were justified in fearing a reversion under the law of Georgia in the event that they did not withdraw as trustee, as that fear is expressed in their Resolution, supra (R. 92-93), it is apparent from that Resolution that it was that fear rather than a desire to exclude Negroes from a park area which motivated them.

It is, of course, true that the doctrine cy pres has been often applied in Georgia, but that doctrine under Georgia law is an intent-enforcing doctrine, and no case is known in which the doctrine was applied for the purpose of applying trust property to a use expressly disapproved of by the settlor. (See again the passage in the will (R. 32-33) where Mr. Bacon expressly disapproves of recreation grounds to be used by both races.)

Further, there is doubt as to whether Mr. Bacon's will evidences any general charitable intent beyond the very specific, detailed plan he outlines for a park for white women and white children. A general charitable intent is universally considered a prerequisite to the application of cy pres.

On the basis of facts before noted respondents submit that the Board of Managers of Baconsfield may not be viewed as a governmental agency. However, it is the position of respondents that it is utterly irrelevant whether the Board as constituted at the beginning of this litigation be viewed as a governmental unit or not. The City was not removed as trustee by the Superior Court, but rather it resolved to resign, an action which it might have taken

without any suit by the Board of Managers or anyone else ever having been filed.

In accepting the resignation of the City of Macon and appointing three persons to serve in its stead as trustees, the Superior Court of Bibb County, Georgia performed a normal function of a court of equity. Courts do not normally command persons to be trustees who do not wish to serve in that capacity. **Shelley v. Kraemer**, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), does not require a court of equity to take affirmative action to compel an unwilling trustee to serve in order to render ineffective valid limitations as to race contained in a private testament.

The administration of Baconsfield in all particulars including the limitation as to race is the product of private choice. No amount of argument regarding Georgia Code, Section 69-504, set out at page 18 of petitioner's brief, can obscure that fact.

The authorization embodied in that statute was unnecessary to the creation of Mr. Bacon's trust. Nor was any statute needed in order to have created a trust for a park for citizens of both races with or without a city as trustee. The law of charitable trusts as understood at common law has always been in full force and effect in Georgia. **Jones v. Habersham**, 107 U. S. 174, 2 S. Ct. 336 (1883). Further, the law of charitable trusts as recognized at common law has been often held to include gifts in trust for the creation of a park. **In Re Smith Estate**, 37 A. 114 (1897). Section 69-504 was not necessary to the creation of a trust involving a park. Nor was it necessary to create a trust with a municipal corporation as trustee. Georgia Code, Section 69-502 (Acts 1892, p. 104), making no reference to race, reads as follows:

> "May act as trustee—The incorporated towns and cities may act as trustees under any conveyance or will

> donating or giving property for charitable or eleemosynary purposes."

Further, Georgia Code, Section 69-504 (Acts 1905, p. 117), did not require limitation as to race. Rather the language is obviously permissive. A settlor is not required to limit his bounty to one race. Rather he "may" so limit his gift if he so desires. Such is the tenor of the statute.

Furthermore, the following quotation from Item Ninth of Mr. Bacon's will makes it abundantly clear that the racial limitation was the product of private choice and that the state was to no significant extent involved (R. 32-33).

> ". . . I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common . . ."

As another alleged example of state discrimination petitioners refer to Georgia Code, Sections 2-5404 and 92-201, on pages 3 and 4 of their Petition. As before noted they are mentioning those two statutes for the first time in their Petition. These provisions they read as requiring racial separation as a prerequisite to tax exemption in the case of a charitable trust. The provisos making reference to race were not in effect at any time during Mr. Bacon's life. The statutes are apparently not cited for any influence those provisos may have exerted upon him. In the case of trusts for colleges, which they purport to cover, the Supreme Court of Georgia has held in **Emory University v. Nash**, 218 Ga. 317, 127 S. E. 2d 798 (1962), that the statutes do not deny tax exemptions to racially desegregated colleges. No case has arisen involving a park, but in a concurring opinion in **Nash** it is suggested at 127 S. E. 2d 803 that the proviso relating to race is so indefinite as to be utterly void.

The statutory provisions in question do not in any event by any normal construction apply to parks or require racial separation as a prerequisite to exemption, but instead the exemption is denied only where endowment funds directed as a matter of private choice for the members of one race are applied in violation of the limitation. Nothing about the statute denies exemption where there is racial "desegregation" but only where there is a misapplication of funds.

Having dealt with the arguments of petitioners concerning the various agencies which allegedly denied them constitutional "rights", respondents submit that the only question involved in this litigation is whether under the attendant circumstances the Superior Court of Bibb County could accept the City's resignation, and that no reason appears for that Court to have required this unwilling trustee to serve.

CONCLUSION.

For the foregoing reasons the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 61

E. S. EVANS, *et al.*,

Petitioners,

—v.—

CHARLES E. NEWTON, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR PETITIONERS

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Supreme Court of Georgia (R. 81) is reported at 220 Ga. 280, 138 S. E. 2d 573.

Jurisdiction

Judgment of the Supreme Court of Georgia was entered on September 28, 1964 (R. 81). Rehearing was denied October 8, 1964 (R. 92). On December 22, 1964, Mr. Justice Stewart extended the time for filing the petition for writ of certiorari to and including March 5, 1965. The petition for writ of certiorari was filed March 5, 1965, and granted April 26, 1965 (R. 93-94).

The jurisdiction of this court is invoked pursuant to 28 U. S. C. §1257(3), petitioners having asserted below

and asserting here denial of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Where (a) Georgia's Legislature expressly authorized the establishment of racially restricted public parks through testamentary charitable trusts;

(b) following creation of such a park and continuous ownership and management by the City of Macon and its agents, city officials took all necessary steps to place the park in private hands for the express purpose of continuing operation of the park on a segregated basis;

(c) the courts of Georgia enforced the will provision directing exclusion of Negroes in preference to a conflicting provision directing perpetual ownership by the city;

(d) the park established by charitable trust is in all respects a public facility and part of the public life of the community; and

(e) the charitable trust is endowed by the state with judicial administration, tax exemption, perpetual existence, and tort immunity:

can the substitution of private trustees to operate the park for white persons only be reconciled with the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following statutes of the State of Georgia:

Ga. Code §69-504 (1933) (Acts, 1905, p. 117):

Gifts for public parks or pleasure grounds.—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property.

Ga. Code §69-505 (1933) (Acts, 1905, pp. 117, 118):

Municipality authorized to accept.—Any municipal corporation, or other persons natural or artificial, as trustees, to whom such devise, gift, or grant is made, may accept the same in behalf of and for the benefit of the class of persons named in the conveyance, and for their exclusive use and enjoyment; with the right to the municipality or trustees to improve, embellish, and ornament the land so granted as a public park, or for other public use as herein specified, and every municipal corporation to which such conveyance shall be made shall have power, by appropriate police provision, to protect the class of persons for whose benefit the devise or grant is made, in the exclusive used (sic) and enjoyment thereof.

Statement

The will of Augustus Octavius Bacon, a United States senator from Georgia, executed March 28, 1911 (R. 10-28), provided for a gift of real property to the City of Macon as owner and trustee to maintain a public park for the white women and children of the City of Macon.[1] A Board of Managers appointed by the mayor and council (R. 19) was to operate the park. The will set aside a separate fund in trust to defray expenses of administering the park (R. 20). The park, named Baconsfield, was operated in accordance with the racial limitation in Bacon's will until the spring of 1963, when Negroes began using it (R. 8, 33). Shortly thereafter, the present suit was instituted by some of the respondents to enforce the racial limitation and to exclude Negroes again from the park.

May 4, 1963, Charles E. Newton and other members of the Board of Managers of Baconsfield filed a petition in the Superior Court of Bibb County, Georgia, requesting removal of the City of Macon as trustee, appointment of new trustees, and transfer of title in Baconsfield to the new trustees. Named as defendants were the City of Macon and the trustees of certain residuary legatees of Bacon's estate, the Curry heirs. Plaintiffs sought expressly to enforce the racially discriminatory terms of Bacon's will (R. 5-10).

The Ctiy of Macon answered (R. 32) admitting most allegations of the petition, but claiming "no authority to enforce racially discriminatory restrictions with regard to property held in fee simple or as trustees for a private or public trust and, as a matter of law, [being] prohibited

[1] The Board of Managers was given discretion to open the park to white men and white non-residents of Macon (R. 20), and this power was exercised (R. 7-8).

from enforcing such racially discriminatory restrictions" (R. 33). Defendant trustees for the Curry heirs answered admitting all allegations of the petition and joining in "each and every prayer of said petition" (R. 34-35); these defendants were represented by the same counsel as plaintiff members of the Board of Managers (R. 10, 35). Plaintiffs then filed a motion for summary judgment (R. 35).

May 29, 1963, petitioners here, Rev. E. S. Evans and five other Negro citizens of Macon, moved to intervene. For the first time a diversity of interest appeared in the lawsuit (R. 36). The intervenors alleged that to appoint new trustees to comply with the racial limitation in Bacon's will would violate the Fourteenth Amendment (R. 40). They requested that the Superior Court "effectuate the general charitable purpose of the testator to establish and endow a public park within the City of Macon by refusing to appoint private persons as trustees" (R. 41).

January 8, 1964, plaintiff members of the Board of Managers amended their original petition, requesting that all Negroes be enjoined from using the park (R. 42-43). The amendment also requested that four previously unrepresented residuary legatees under Bacon's will, the Sparks heirs (R. 44), be added as plaintiffs and that the trustees of the Curry heirs, originally joined as defendants, be permitted to assert the Curry heirs' interests as plaintiffs (R. 44). Simultaneously, the Sparks heirs intervened, asking that all relief requested by the original plaintiffs be granted (R. 45-46). At the same time, the trustees for the Curry heirs concurred in asking to be allowed to assert their interests as plaintiffs, and joined in all of plaintiffs' prayers for relief (R. 47-48). The Sparks heirs and the trustees for the Curry heirs, all of whom were represented by counsel for the plaintiff board members, asked for reversion of the trust property into Bacon's estate if other relief were denied (R. 47, 49).

February 5, 1964, the City of Macon, the only defendant making any pretense of defending the suit, amended its answer to state that it had resigned as trustee of Baconsfield (R. 50) pursuant to resolution of the mayor and council on February 4, 1964 (R. 51-61), and requesting the court's acceptance of its resignation and the appointment of substitute trustees (R. 50-51).

On May 5, 1964, the Negro intervenors amended their petition, alleging that the Fourteenth Amendment would be violated if the relief sought by the other parties were granted (R. 62-63). Intervenors asked the court to "withhold approval of the attempted resignation of the City of Macon as trustee under the will of A. O. Bacon, [and] direct the City of Macon to continue to fulfill this paramount constitutional obligation to administer the park on a racially non-discriminatory basis . . ." (R. 63).

No evidentiary hearing was held. The Superior Court issued its decree[2] March 10, 1964, allowing intervention

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[2] The Superior Court also issued a letter opinion, reprinted in the Petition for Writ of Certiorari, pp. 11a-12a, which was as follows:

> After careful consideration of the Motion for Summary Judgment in the above stated case, I have reached the following conclusions:
>
> The racial limitation in Senator A. O. Bacon's will is not unlawful for any reason as contended by the intervenors, Reverend E. S. Evans, et al.
>
> The inability of the City of Macon, as Trustee, to apply constitutionally the racial criterion prescribed by the testator for use of the property as a park for white women and white children affected the trustee and not the trust, and the City having tendered its resignation as trustee, it is proper that the Court accept the resignation and appoint private trustees who can carry out the purpose and intent of the testator as set forth in the will.
>
> It is my opinion that the doctrine of Cy Pres cannot be applied to Baconsfield. There is no general charitable purpose expressed in the will. It is clear that the testator sought to benefit a certain group of people, i.e., "the white women, white girls, white boys and white children of the City of Macon", and it is clear that he sought to benefit them only in a certain way, i.e., by providing them with a park or playground. Senator Bacon could not have used language more clearly indicating his intent that the benefits of Baconsfield should be extended to white persons only, or more clearly indicating

by all who requested it, accepting the resignation of the City of Macon as trustee of Baconsfield, appointing three private individuals as new trustees, and retaining jurisdiction (R. 64-65). No ruling was made on the requests that Negroes be enjoined from using the park. The conditional prayers for reversion of the trust property were held moot (R. 65).

Negro intervenors, petitioners here, appealed to the Supreme Court of Georgia. On September 28, 1964, the Supreme Court of Georgia affirmed the judgment of the Superior Court of Bibb County (R. 81, 89). A motion for rehearing was denied on October 8, 1964 (R. 92).

Summary of Argument

Before Senator Bacon wrote his will creating Baconsfield for white persons only, Georgia enacted Ga. Code §69-504, expressly authorizing gifts of land to public or private trustees for the establishment of racially restricted public parks. The natural tendency of the statute was to encourage if not to force testators to specify segregation, and under the principles announced in *Peterson* v. *Greenville,* 373 U. S. 244 and *Robinson* v. *Florida,* 378 U. S. 153, the testator's personal preference for segregation, if any, must be disregarded. By placing its authority behind discriminatory classification based solely on color, the state denies equal protection of the laws. *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 726, 727 (concurring and dissenting opinions).

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that this limitation was an essential and indispensable part of his plan for Baconsfield.

The Court has, therefore, this day signed and filed with the Clerk of this Court an order and decree, a copy of which is herewith enclosed.

The actions of the Board of Managers of Baconsfield and the Mayor and Council of the City of Macon represent a glaring illustration of state action to enforce segregation. As owner and trustee, the city through the board operated Baconsfield for white persons in violation of *Pennsylvania* v. *Board of City Trusts,* 353 U. S. 230. In 1963, when Negroes went on the property, rather than treat the racial limitation as absolutely void, the city and board went to court to enforce it. This contravened *Shelley* v. *Kraemer,* 334 U. S. 1, and Bacon's stated intent that the city retain perpetual control. By submitting its resignation, the city transferred public property to private persons for the invidious purpose of assuring continued segregation.

Georgia's courts violated the Fourteenth Amendment by enforcing the racial limitation in Bacon's will. *Shelley* v. *Kraemer, supra.* Under *Pennsylvania* v. *Board of City Trusts, supra,* that limitation was null and void, but the courts below gave it effect although it was in direct conflict with another provision of Bacon's will directing perpetual ownership by the city. In doing so, the courts acted in defiance of the Constitution which forbids a state to implement segregation.

As a public facility operated for the benefit of the community, Baconsfield cannot be restricted to white persons under the Fourteenth Amendment. Like the company town in *Marsh* v. *Alabama,* 326 U. S. 501, Baconsfield, even if owned by private trustees, is similar in all respects to facilities owned and operated by the state. Like the hospitals in *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (4th Cir. 1963) cert. denied 376 U. S. 938 and *Eaton* v. *Grubbs,* 329 F. 2d 710 (4th Cir. 1964), Baconsfield fulfills an essential public function that might otherwise have to be performed by the state. Moreover,

Baconsfield is so much a part of the public life of the community that whether owned by public or private interests, exclusion of one race is inconsistent with the Fourteenth Amendment.

As a charitable trust given significant state protection in the form of judicial administration, tax exemption, perpetual existence and tort immunity, Baconsfield must be subjected to special scrutiny before being permitted to exclude Negroes. While all charitable trusts are similarly favored the court need not decide whether all arbitrary discriminations are forbidden in all such trusts. But when a charitable trust receiving these advantages has been created pursuant to a state policy of segregation, has been operated by the state on a segregated basis, has been turned over to private control to continue segregation, and has created a facility of an inherently public nature, that trust cannot be allowed to perpetrate the very type of arbitrary discrimination proscribed by the Fourteenth Amendment.

ARGUMENT

I.

A Park Established by Testamentary Trust, in Conformity With a Statute Authorizing and Encouraging Racial Restrictions, Cannot Exclude Negroes as a Class.

The Bibb County Superior Court accepted the City of Macon's resignation and appointed private trustees, believing they could enforce the racial restriction in Bacon's will forbidden to the city by the Constitution. Finding the racial limitation "essential and indispensable," (*supra* p. 7) the court approved the change in trustees as the way to preserve the limitation without violating the Con-

stitution. The court's conclusion that private trustees could do what the city might not does not stand the test of examination. The state's encouragement and sanctioning of segregated parks through passage of Ga. Code §69-504 invalidates enforcement of the racial restriction whether Baconsfield is operated by public or private trustees. Cf. *Robinson* v. *Florida*, 378 U. S. 153.

In 1905 Georgia's Legislature enacted what is now Ga. Code §69-504 (Acts 1905, p. 117), authorizing the conveyance of land to be "dedicated in perpetuity to public use as a park, pleasure ground, or other public purpose . . ." The conveyance could be by "devise, gift, or grant," in fee simple to a municipal corporation or in trust to a municipal corporation or other persons. The statute expressly authorized limitation of use of conveyed property "to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only." A companion statute empowered municipalities to accept such gifts and "by appropriate police provision, to protect the class of persons for whose benefit the devise or grant is made, in the exclusive use and enjoyment thereof." Ga. Code §69-505 (Acts 1905, pp. 117-18).

In 1911 Senator Augustus Octavius Bacon followed the provisions of §69-504, providing in his will a gift of land to the City of Macon

> in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, . . . (R. 19).

The similarity between the statute and the will leaves no doubt that Senator Bacon was seeking to assure perpetual enforcement of the trust by strict compliance with every aspect of §69-504. Bacon was taking no chances that there might be a failure of the trust. The close connection between Georgia's statute and Senator Bacon's carefully drawn will defeats any possible argument that Baconsfield is the product of purely private action. As in *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 463, "the crucial factor is the interplay of governmental and private action."

It is argued that §69-504 had nothing to do with Bacon's decision to limit use of the park to one race, and Bacon's will did express his view that "in their social relations with two races . . . should be forever separate" (R. 21). But the statute obviously encouraged racial restrictions and strongly implied that a trust for unrestricted parks would not be upheld. In 1911 there was no judicial construction of the act, and nothing in the statute itself indicated it was permissive rather than mandatory. The statute was passed at a time when Georgia was requiring segregation in many other areas.[3] Its companion statute expressly authorized use of the police power to enforce racial limitations in municipal parks, Ga. Acts 1905, pp. 117-18, now Ga. Code §69-505. Certainly, §69-504's listing of six types of authorized racial limitations, considered in light of the maxim *inclusio unius est exclusio alterius,* was an awesome portent that Georgia would not tolerate unsegregated parks.

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[3] E.g., Ga. Acts 1870, p. 398 (segregation on railroads and other common carriers); Ga. Acts 1887, p. 68, and Acts 1889, p. 124 (school segregation); Ga. Acts 1890-91, Vol. I, p. 114 (segregation in state university); Ga. Acts 1894, pp. 115, 117 and Acts 1908, p. 58 (segregation of names on voting lists); Ga. Acts 1894, p. 31 and Acts 1874, p. 109 (segregated tax returns); Ga. Acts 1897, pp. 71, 73 and Acts 1890-91, p. 213 (segregation of prisoners).

The significance of §69-504 is best understood when considered against the background of prior Georgia law. As respondents concede, Georgia had long enforced charitable trusts, see *Jones* v. *Habersham*, 107 U. S. 179, and municipalities had been authorized to act as trustees of such trusts in 1892. Ga. Acts 1892, p. 104, now Ga. Code, §69-502. There were thus only a limited number of possible reasons for enactment of §69-504: to make it plain that creation of a park was a valid charitable purpose, to require that parks established under charitable trusts be restricted to one race, or to encourage racial restrictions by making it clear that segregated parks would be acceptable. It is unlikely that §69-504 was passed merely to validate parks as charitable trusts. An old Georgia law, now Code §108-203, defining charitable purposes does not expressly mention public parks, but no previous Georgia cases had refused to recognize them as charitable, and courts in several other states had accepted them.[4] However, it was far from clear that a park restricted to one race would be considered charitable. Traditionally, only trusts for educational or religious purposes, or for aid of the poor, could be limited to a restricted class; trusts for other, or "community benefit," purposes would not be recognized unless their facilities were open to all members of the community. See 4 Scott, Trusts, p. 2715, §375.2 (2d ed. 1956). See also id., p. 2650 (§371) and p. 2660 (§371.6). Section 69-504 turned the law of trusts upside down, creating serious doubts that trusts for parks open to the whole community would be enforced, and establishing that racially restricted parks were acceptable to the state. Whether the racial provision of §69-504 is viewed as manda-

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[4] *Cresson's Appeal*, 30 Pa. 437 (1858); *Lackland* v. *Walker*, 151 Mo. 210, 52 S. W. 414 (1899); *Burbank* v. *Burbank*, 152 Mass. 254, 25 N. E. 427 (1890); *cf. Lester* v. *Jackson*, 69 Miss. 887, 11 So. 114 (1892).

tory or permissive, Georgia's legislature obviously served the cause of segregation by enacting it.

Whatever the construction eventually placed upon it, §69-504 could only encourage testators to encumber their charitable trusts with racial restrictions. Thus Georgia shares with Senator Bacon the responsibility for exclusion of Negroes from Baconsfield. When segregation by private persons is required by statute or ordinance, *Peterson* v. *Greenville,* 373 U. S. 244, 248; or executive command, *Lombard* v. *Louisiana,* 373 U. S. 267; or encouraged[5] by administrative regulation, *Robinson* v. *Florida,* 378 U. S. 153, private motivation is overshadowed by the state's intervention. See also *Parrot* v. *Tallahassee,* 381 U. S. 129; *Fox* v. *North Carolina,* 378 U. S. 587; *Williams* v. *North Carolina,* 378 U. S. 548.

The state's encouragement of private discrimination is much more effective here than in *Robinson,* where the state required racially separate restrooms if both races were served or employed. A private decision to integrate a restaurant could easily be effectuated in Florida by installing separate restroom facilities, if indeed the restaurant did not already have them for Negro employees. But there was no way for a testator in Georgia to be assured that his trust would be upheld if he did not direct the exclusion of one race from the park.

Support for petitioners' position can be also found in the views expressed by several members of this Court in *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715. Justice Stewart, concurring, 365 U. S. at 726, read the decision below as construing a Delaware statute to au-

[5] In other contexts, this Court has proscribed encouragement of discrimination by the state. *Anderson* v. *Martin,* 375 U. S. 399; *Barrows* v. *Jackson,* 346 U. S. 249, 254. See also *Gantt* v. *Clemson Agricultural College,* 320 F. 2d 611, 613 (4th Cir. 1963).

thorize "discriminatory classification based exclusively on color," and thus "clearly violative of the Fourteenth Amendment." 365 U. S. at 727. Justices Frankfurter, Harlan, and Whittaker could not accept the premise but agreed with the conclusion. 365 U. S. at 727, 728. As Justice Frankfurter wrote, "For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws." 365 U. S. at 727 (dissenting opinion). Here, certainly, is a statute authorizing discriminatory classification based exclusively on color and thus violative of the Constitution.[6]

It has been noted above that §69-504 authorized gifts to private trustees, as well as municipalities, for establishment of public parks. Had Bacon given his land to private trustees rather than the city it is just as clear that the racial limitation, inspired and sanctioned by the state, could not be enforced. Thus, contrary to the reasoning of respondents and the courts below, the transfer of Baconsfield from public to private trustees had no effect whatever on the enforceability of the racial clause in Bacon's will, and to effect that transfer was erroneous. Petitioners, who resisted that transfer in the courts below, complain not only because the court's action was erroneous, but also because it was injurious to them and all Negroes in Macon. The Superior Court transferred ownership in Baconsfield from the city, which had acknowledged an inability to enforce the limitation, to private trustees whose very existence is dependent upon an understanding—albeit erroneous—that they could exclude Negroes with impunity.

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[6] In *Burton*, the dissenting justices thought Delaware's statute might be merely declaratory of the common law which allowed a restaurant to exclude any person for any reason. In this case the statute is not ambiguous. It speaks in terms of white and colored. Delaware's statute made no reference to race, nor did its Supreme Court in stating the common law.

II.

City Officials Are Directly Responsible for Exclusion of Negroes From Baconsfield.

This lawsuit is a superb example of concerted action by state officials to enforce segregation. Compliance with Senator Bacon's racial restriction by the City of Macon as owner and trustee, and by the city-appointed Board of Managers, was precluded by the decision in *Pennsylvania* v. *Board of Directors of City Trusts,* 353 U. S. 230. But rather than comply with the Constitution and treat the racial restriction as *pro non scripto,* just as segregation statutes are dead letters today, city officials devised means of warding off Negro use of the park.

First, the Board of Managers of Baconsfield petitioned the Superior Court to replace the city as trustee. Its case was bottomed on the racial language of Bacon's will; no reason was offered except that the city was not limiting the park to white persons. The ultimate power of appointing board members resided with the city. Thus, a state agency was petitioning a court to effect a change in a charitable trust to exclude Negroes from a place of public recreation.

The defendant City of Macon could find no reason to object to its displacement. Its answer merely admitted the petition's allegations and apologized for the city's constitutional disability to eject Negroes. Raising no defenses, the city placidly acquiesced in divestment of its title to the property and its power to appoint members of the Board of Managers, despite Senator Bacon's stern injunction that the property was "under no circumstances, or by any au-

thority whatsoever, to be sold or alienated or disposed of. . . ." (R. 19). Apparently, the city decided not to assert the defense that transfer of its property to discriminate racially would violate the Fourteenth Amendment.

Following Negro petitioners' intervention, the city adopted another stance and submitted its resignation to the court. In its resolution authorizing the resignation, the city offered as its principal reason that the city deemed "it to be in the public interest that Baconsfield be operated and maintained for the benefit of the public rather than for private benefit or profit" and without the city's withdrawal "the property may revert" to Bacon's heirs "in which case Baconsfield would become commercial or residential property or property wherein no part of the public would have the enjoyment of the property . . ." (R. 60). Thus, the city was taking affirmative action, in the name of "the public interest," to preserve a park for "part of the public"—the white part. Assuming that the city was faced with a hard choice between no park at all and one for whites only, it takes a weird construction of the Fourteenth Amendment to say a subdivision of the state can opt for the latter.

The city had several alternatives consistent with the Fourteenth Amendment and in harmony with the interests of its white as well as Negro citizens. It could have resisted the board's petition with a powerful argument that destruction of its title by the Superior Court for purposes of enforcing segregation would violate the Fourteenth Amendment under the rule established in *Shelley* v. *Kraemer,* 334 U. S. 1. The city also should have urged that the racial limitation in Bacon's will must fall for its inconsistency with other provisions of the will manifesting Bacon's intent that the city never surrender control of Baconsfield.

Bacon had described the city's interest in the property as comprehending:

> all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind.... (R. 19).

The property was "under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of...." (R. 19). The will went on to say:

> ... I further specifically provide and direct that the said trustees hereinbefore named and their successors shall not have power or authority to sell or otherwise alienate or dispose of the tract of land thus described, bounded and platted or any part thereof during the continuance of said trust or trusts or at any other time, under any circumstances and upon any account whatsoever, and all such power to make such sale or alienation is hereby expressly denied to them, and to all others (R. 22).

By resigning the city ignored Bacon's intent. Had the city resisted the Board's petition in an attempt to retain the property, the court would have been much more likely to choose to follow Bacon's language concerning ownership rather than that concerning racial limitation. (See Argument III, *infra*). In a recent Texas case the court held that the intent of the donor of Rice University to maintain a first-class educational institution, which could no longer be accomplished without foundation grants stipulating nondiscrimination, outweighed the intent to exclude Negroes. *Rice University* v. *Carr,* 9 Race Rel. L. Rep. 613 (D. C. Harris County 1964), appeal dismissed, No. 14,472 (Tex. Civ. App. 1965). Cf. *Guillory* v. *Administrators of Tulane University,* 212 F. Supp. 674, 687 (E. D. La. 1962). Moreover, in an analogous situation, the Georgia Supreme Court

allowed Emory University to admit Negroes without forfeiting tax exemption because the statute conditioning university tax exemption on the maintenance of segregation was construed to conflict with another clause of the same statute. *Emory University* v. *Nash,* 218 Ga. 317, 127 S. E. 2d 798 (1962). There was, therefore, reason to believe that the argument here suggested might have been well received by the State Supreme Court.

Spurning the opportunity to contest the suit and preserve Baconsfield for all of its constituency, the city presented its resignation to the Superior Court. If one accepts respondents' notion that the Superior Court had no choice but to relieve the unwilling trustee of the burden of office (see Brief in Opposition, p. 12), the city is solely responsible for turning a piece of public property over to private persons for the purpose of maintaining racial segregation.

There are many ways of manipulating property interests so that official discrimination can be continued under the guise of private discrimination, but they are all fruitless because the Fourteenth Amendment is notably intolerant of technical evasions. The most common method is to lease public property to private interests, but it is now well settled that the private lessee is governed by the constitutional standards limiting the state, if the state retains any significant involvement or control. See *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715; *Turner* v. *Memphis,* 369 U. S. 350; *Derrington* v. *Plummer,* 240 F. 2d 922 (5th Cir. 1956), cert. denied *sub nom. Casey* v. *Plummer,* 353 U. S. 924. Where substantial state involvement or control remains it is, of course, immaterial whether the property was conveyed for the purpose of perpetuating discrimination. Where there is such a purpose, the Fourteenth Amendment restricts the actions of the lessee whether or not the state

continues to be involved. See *Tate* v. *Department of Conservation and Development*, 231 F. 2d 615 (4th Cir. 1956); *Derrington* v. *Plummer, supra*, 240 F. 2d at 925. Similar considerations govern the applicability of the Fourteenth Amendment when public land is sold to private interests. The sale does not alter the constitutional obligations of the owner if significant control is retained by the state, see *Hampton* v. *Jacksonville*, 304 F. 2d 320 (5th Cir. 1962), cert. denied *sub nom. Ghioto* v. *Hampton*, 371 U. S. 911; *Smith* v. *Holiday Inns of America, Inc.*, 336 F. 2d 630 (6th Cir. 1964), or if the purpose was to continue discrimination, see *Hampton* v. *Jacksonville, supra*, 304 F. 2d at 331 (Jones, J., concurring). *A fortiori*, the state may not give land away to private persons for the purpose of perpetuating racial segregation. Cf. *Griffin* v. *School Board*, 377 U. S. 218, 231. The City of Macon therefore could not transfer property without consideration for the explicit purpose of promoting segregation and in the knowledge that segregation would be required.

III.

In Deciding an Issue of State Law, the Courts of Georgia Accorded the Racial Limitation in Bacon's Will a Deference Inconsistent With Supreme Federal Law.

No one branch of government can claim full credit for keeping Baconsfield white. Each made a unique contribution, the Superior Court of Bibb County no less than the others. It issued the order accepting the city's resignation and appointing three new trustees.[7]

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[7] In the second *Girard College Case*, the Supreme Court of Pennsylvania approved the appointment of private trustees to continue discriminatory operation. *Estate of Stephen Girard*, 391 Pa. 434, 138 A. 2d 844 (1958), appeal dismissed and cert. denied, 357 U. S. 570. Denial of review by this Court was not a ruling on the merits, and petitioners submit that the Pennsylvania Supreme Court ruled erroneously.

If the principle of *Shelley* v. *Kraemer*, 334 U. S. 1, is not to be strictly limited to restrictive covenants, the Superior Court's order was invalid. Accepting the arguments of the board and the city, the court replaced the city in order that Baconsfield might continue to be operated on a segregated basis in accordance with the terms of Bacon's will. This is, if anything is, enforcement by the judiciary of racial separation and wholly inconsistent with the equal protection of the laws.

The Superior Court held "it is proper that the court accept the resignation and appoint private trustees who can carry out the purpose and intent of the testator as set forth in the will" (*supra*, p. 6, n. 2). Under *Shelley* v. *Kraemer*, *supra*, the Superior Court's enforcement of the racial limitation would violate the Constitution even if it were unequivocally clear that Bacon intended to limit use of his park to white persons at the expense of having control of the park transferred to private interests. However, that issue is not necessarily presented by this record, because Bacon's will manifested contradictory desires. If Bacon intended that the park be restricted to white persons, it is no less clear that he intended Baconsfield to be forever owned by the City of Macon. The will provisions quoted on pages 16, 17, *supra*, establish this beyond question. The decision in *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 230, renders impossible the present effectuation of both desires. What the Superior Court did was to ignore Bacon's intention as to ownership and implement the intention as to racial selection.

Petitioners submit that the courts of Georgia were not at liberty to make such a choice. Bacon wanted a park for white persons; he wanted the city as trustee. He offered no intimation as to which desire should prevail in case of

conflict. Faced with the necessity of making the choice that Bacon had never contemplated, the Superior Court chose segregation, just as the city had done. The court's action is no more compatible with the Fourteenth Amendment. No branch of government can require, encourage or participate in a policy of racial segregation, *Cooper* v. *Aaron*, 358 U. S. 1, 16-17, and certainly a court cannot decide to enforce a will provision mandating segregation as against another provision that is in harmony with the Constitution.

The court's decision cannot be passed off as the resolution of a will construction problem under traditional rules of state law. Overriding federal law steps in and says that any term of the will that blatantly violated the Fourteenth Amendment is not entitled to consideration by the state court. Had the Georgia courts followed this principle, they would have had no choice but to implement the provision requiring perpetual ownership by the city.

Petitioners requested that the court reject the resignation and compel the city to fulfill its obligation under the will and its constitutional obligation to accord equal treatment to all citizens (R. 63). By rejecting this request, the courts of Georgia acted in defiance of the Constitution.

IV.

Baconsfield Is a Public Facility From Which Negroes Cannot Be Excluded.

Respondents have argued that "characterization of Baconsfield as a 'public' park begs the question" (Brief in Opposition, p. 7), but calling it public has substantive as well as semantic significance. It was created pursuant to Ga. Code §69-504, which bears the heading "Gifts for public parks or pleasure grounds." The statute describes the lands conveyed as "dedicated in perpetuity to the public use as a park, pleasure ground or for other public purpose." In every conceivable respect but one Baconsfield is and has been a public park. Until this litigation it was owned by the city and operated under the management of an appointed board of managers. The city and board also owned and administered the separate trust fund set aside by Bacon for maintenance of the park (R. 22-25). The city, through its board, had "complete and unrestricted control and management of the said property with power to make all needful regulations for the preservation and improvement" of the park (R. 3). Ga. Code §69-505 authorized the city "to improve, embellish, and ornament the land so granted as a public park," and so far as the record shows, Baconsfield's appearance is like that of any other public park. The great majority of the public are allowed to go on the premises of this large,[8] open tract of land at will and without charge.

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[8] Baconsfield's area does not appear in the record, but its dimensions as set forth in the legal description are very large. The irregular eastern boundary is approximately 4155 feet, the northern boundary is 1662 feet, the western and southern boundaries at least 3397 and 437 feet, respectively (R. 17).

The only difference between Baconsfield and any other public park is the exclusion of Negroes. But that does not differentiate it from other public parks in Georgia, where the policy of the state, as expressed in §69-504 and as manifested by the actions of all state agencies in this suit, has been to have all public parks exclude one race or the other. Even after the decisions outlawing racial segregation in public schools and other public facilities, e.g., *Brown* v. *Board of Education,* 347 U. S. 483; *Muir* v. *Louisville Park Theatrical Ass'n.,* 347 U. S. 971; *New Orleans City Park Improve. Ass'n* v. *Detiege,* 358 U. S. 54; *Watson* v. *Memphis,* 373 U. S. 526, several Georgia communities have been guilty of requiring segregation in public recreational facilities or actually operating segregated facilities, see, e.g., *Holmes* v. *City of Atlanta,* 350 U. S. 879; *Anderson* v. *Albany,* 321 F. 2d 649 (5th Cir. 1963); *Law* v. *Jekyll Island State Park Authority,* C. A. No. 8579 (N. D. Ga., July 27, 1964); cf. *Wright* v. *Georgia,* 373 U. S. 284.[9] This Court's rulings having rendered unlawful the continued operation of public parks on a segregated basis, it is an anomaly indeed if this park can be singled out and allowed to segregate.

Irrespective of state ownership, past or present, it is highly questionable whether any open park land available for use by a majority of the people can be segregated. By close analogy, this Court's decision in *Marsh* v. *Alabama,* 326 U. S. 501, indicates that even a privately owned park which is open to most of the public must admit all of the public. In *Marsh* the court emphasized the similarity between the company town of Chicasaw and any other town,

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[9] In 1956, in an obvious response to *Holmes* v. *Atlanta,* 350 U. S. 879, Georgia enacted a law allowing public parks to be sold, leased or otherwise disposed of without regard to whether the property was unsuitable or inadequate for park purposes. Act No. 20, Ga. Laws 1956, Vol. I, p. 22.

and refused to accept private ownership as a reason for ignoring the Fourteenth Amendment:

> ... Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.... Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.... 326 U. S. at 506.

Petitioners submit that recreational parks are also "built and operated primarily to benefit the public" and "their operation is essentially a public function."[10] The Legislature of Georgia in 1905 viewed it a public function to encourage the establishment of public parks, see Ga. Code §69-504, and present Georgia law authorizes municipalities to set aside existing public property or acquire new property for use as parks, playgrounds, and recreation centers, see Ga. Gode Ann. §§69-601 to 69-616. Thus the reasoning in *Marsh* v. *Alabama* fully supports the contention that irrespective of ownership, a public park cannot be operated for white persons only. To hold otherwise would be to say that the validity of an absolute prohibition on the distribution of literature in Baconsfield depends on who holds legal title.

The overriding significance of function, as opposed to ownership, is also demonstrated by the decisions of the Fourth Circuit in *Simkins* v. *Moses H. Cone Memorial*

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[10] See *Lombard* v. *Louisiana*, 373 U. S. 267, 274 (concurring opinion); *Bell* v. *Maryland*, 378 U. S. 226, 286 (concurring opinion).

Hospital, 323 F. 2d 959 (4th Cir. 1963), cert. denied, 376 U. S. 938, and *Eaton* v. *Grubbs*, 329 F. 2d 710 (4th Cir. 1964), which held that medical facilities owned and operated by private groups under comprehensive state plans are subject to the nondiscrimination requirements of the Fourteenth Amendment. These decisions clearly apply to those private facilities which the state takes into account when deciding whether to provide other facilities. Baconsfield is such a facility, for the City of Macon stated its concern, in the resolution authorizing resignation, that Baconsfield not be lost to public use (R. 60).

Baconsfield is not a hospital with necessary limitations on entry and use. It is open park land, inherently a part of the public life of the community. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U. S. 496, 515 (concurring opinion).

The considerations discussed above support the conclusion that Baconsfield would have to be opened to all of the public even if it had never been owned and managed by the city. Petitioner's case is strengthened by the history of Baconsfield's ownership and operation by the city and the transfer to private trustees for the purpose of allowing discrimination.

V.

The Charitable Trust in This Case Is so Much the Creature of the State and so Related to an Inherently Public Aspect of Community Life as to Be Governed by the Fourteenth Amendment Prohibition of Racial Discrimination.

The State of Georgia is in so many ways responsible for the creation of Baconsfield and its continuous operation on a segregated basis that it is difficult to isolate the various strands of doctrine supporting petitioners' constitutional position. Focus has centered on the statute enacted in 1905 which puts this case well within the rule of *Peterson* v. *Greenville* and *Robinson* v. *Florida*. Emphasis has been placed upon the concerted action of state agencies toward the single goal of assuring segregation in Baconsfield. These factors make *Shelley* v. *Kraemer* applicable as well as those cases forbidding a state institution to transfer public property for the purpose of continuing racial discrimination. It has been argued that the courts of Georgia violated the Fourteenth Amendment by giving weight and preference to an invalid racial limitation over another, inconsistent clause in Bacon's will. And the fourth argument was that Baconsfield is inherently a public facility like any other public park, which under the doctrine of *Marsh* v. *Alabama* and the recent hospital cases cannot discriminate even when operated by private trustees.

Those arguments are sound, but there is another concerning the unique nature of the charitable trust that should be considered by the Court. A charitable trust is so much a creature of the state that it ought to be subjected to particularly close scrutiny when it calls for discrimination against persons according to race or color.

The testamentary charitable trust takes effect only when the state's judicial branch upholds its validity and sanctions its enforcement. If in the eyes of the state the trust does not serve a permissible public purpose, it will not be enforced. The very fact that the Baconsfield trust was approved by the state demonstrates, apart from the significance of Ga. Code §69-504, that the State of Georgia approves the establishment of public institutions for the exclusive benefit of white persons. If the State of Georgia, acting through its legislature or courts, determined that the operation of public facilities for one race only was inconsistent with public policy, Baconsfield would not exist in its present form.

The usual purposes of charitable trusts such as support of educational and religious institutions, aid for the poor, and other goals generally accepted as charitable are approved by the state because dollars given by the charitable donor fulfill needs that, except for religion, would otherwise be a burden of the state. It is incongruous in the extreme that the state should protect and enforce charitable institutions serving the needs of the state but not governed by essential principles of fairness which the state itself is bound by the Constitution to observe.

Georgia, like other states, has an elaborate legal structure encouraging and sanctioning the creation of charitable trusts. Statutes provide for the enforcement of charitable trusts in equity, see Ga. Code Ann. §108-201, continuous supervision by the courts, §108-204, and effectuation of the testator's charitable intent under the *cy pres* doctrine, §108-202. Charitable trusts are looked upon with special favor, see, e.g., *Simpson* v. *Anderson,* 220 Ga. 155, 137 S. E. 2d 638 (1964); *Goree* v. *Georgia Industrial Home,* 187 Ga. 368, 200 S. E. 684 (1938).

The testamentary charitable trust begins with state approval by the court of equity. The trustees are bound to follow the terms of the trust, and since the beneficiaries of charitable trusts by definition constitute a rather broad class of individuals, the trustees may be challenged not only by members of the favored group, but by the state attorney general or, in Georgia, the solicitor general of the circuit in which the trust corpus lies. See Ga. Code §108-212.

Having encouraged the creation of charitable trusts and provided a system of law, both legislative and judicial, for their effectuation, the state does not end its aid to charitable trusts. It grants them among other things exemption from taxation. Georgia's constitution and statutes are no exception from the general rule. See Ga. Const. 1945, Art. 7, Sec. 1, Par. 4; Ga. Code §2-5404; Ga. Code §92-201. It happens that since 1918 Georgia has conditioned tax exemption on the maintenance of racial restrictions in the operation of charitable trusts: "all endowments to institutions established for white people, shall be limited to white people, and all endowments to institutions established for colored people, shall be limited to colored people;" Editorial note, Ga. Const. 1877, Art. 7, Sec. 2, Par. 1, Ga. Code Ann. §2-5002. Tax exemption is a boon to the testator setting up a charitable trust. It assures that the resources he leaves will not be siphoned off into the state treasury but will be devoted exclusively to his purposes. The state exempts charitable trust assets from taxation because the trust is doing the work of the state; for the state to tax them would be like removing money from one pocket and placing it into another.

Probably even more desirable to the testator considering the establishment of a charitable trust is that most valuable incident, perpetual existence. Private trusts are restricted

in duration by the rule against perpetuities, see, Ga. Code §85-707, but charitable trusts are not, see *Regents of University System* v. *Trust Co. of Georgia,* 186 Ga. 498, 512, 198 S. E. 345 (1938); *Murphy* v. *Johnston,* 190 Ga. 23, 8 S. E. 2d 23 (1940); *Pace* v. *Dukes,* 205 Ga. 835, 55 S. E. 2d 367 (1949). See also Ga. Code §69-504. The state allows dead hand control perpetually on the theory that the public will perpetually benefit from a charitable trust. A man has some right to exercise his prejudices in the use of his private property during his life, and to dispose of his property by will, making arbitrary choices about its recipients and uses. But no man has the right to control his property through eternity. The state sets temporal limits on testamentary encumbrances, and in the exceptional situation of the charitable trust it exercises close supervision. In this case Georgia has not only given Bacon's trust perpetual existence, but has exercised its broad powers to assure the maintenance of segregation to the end of time.

Another advantage conferred by Georgia on charitable trusts is immunity from tort liability in certain situations. An institution's "charitable assets" cannot be recovered for the negligence of employees. *Morehouse College* v. *Russell,* 219 Ga. 717, 135 S. E. 2d 432 (1964); *id.,* 109 Ga. App. 301, 136 S. E. 2d 179 (1964); *Cox* v. *De Jarnette,* 104 Ga. App. 664, 123 S. E. 2d 16 (1961). Georgia has a comparable doctrine of tort immunity for municipalities, Ga. Code §69-301, which applies to the operation of public parks, *Stubbs* v. *City of Macon,* 78 Ga. App. 237, 50 S. E. 2d 866 (1948); *Jones* v. *City of Atlanta,* 35 App. 376, 133 S. E. 521 (Ga. Ct. App. 1926).

The features of state involvement in the creation of charitable trusts are so manifold that such trusts are to a significant degree creatures of the state and the special

beneficiaries of the state even though they begin with a private decision and with privately owned property. See Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard,* 66 Yale L. J. 979, 1002-09 (1957). Without regard to whether other types of charitable trusts should, because of these state contacts, be subject to the Fourteenth Amendment, the Baconsfield trust has features which require that it be subject to the Amendment. The Baconsfield trust receives the continued support, recognition, and sanction of state law on the theory that a park is a benefit to the community and serves the community. It is a trust totally involved with the public life of the community, the intended domain of the Fourteenth Amendment, and is to some degree distinct from charitable trusts which because of the nature of their enterprises necessarily offer direct benefits to only small portions of the community. Baconsfield was established so as to offer its beneficial use directly to every member of the public, except Negroes. It flies in the face of the Fourteenth Amendment's prohibition against the exclusion of persons from the benefits and protections of state law on the basis of race. This is all the more evident where, as here, the initial decision to discriminate racially was encouraged by an explicitly racial state statute. An overall appraisal of the nature of state involvement in the trust, the nature and function of the trust in the community, "the benefits mutually conferred" by the testator and the state, and the role of the state legislature and state judiciary in establishing and continuing the park on a segregated basis, leads irresistibly to the conclusion that this case involves "that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn." *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 724.

CONCLUSION

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 61

E. S. EVANS, ET AL., PETITIONERS

v.

CHARLES E. NEWTON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The order and decree of the Superior Court of Bibb County (R. 64–66) are not reported. The opinion of the Supreme Court of Georgia (R. 81–88) is reported at 220 Ga. 280, 138 S.E. 2d 573.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on September 28, 1964 (R. 89). Rehearing was denied on October 8, 1964 (R. 92). By order of December 22, 1964, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including March 5, 1965 (R. 93). The petition was filed on that date, and granted on April 26, 1965 (R. 94; 380 U.S. 971). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTION PRESENTED

Baconsfield is a large park and recreation area established for the use of all white persons of the City of Macon, Georgia, under a charitable trust which originally (in 1911) designated the City as trustee. In 1963, the City managers of Baconsfield brought the present suit in a State court to have private trustees designated in place of the City. The purpose was to permit Baconsfield to continue operation as a facility for whites only. In the course of the action, the City resigned as trustee and the court appointed private trustees.

The question presented is whether Baconsfield, viewed in the light of its history and taking into account its public role in the community, the public incidents and effects of its operation and the extensive character of the State's involvement in its establishment and administration, is to be regarded as a public institution subject to the requirement of the Fourteenth Amendment that its use not be denied to Negroes on the basis of their race.

INTEREST OF THE UNITED STATES

The denial of equal opportunities to this country's Negro citizens is a matter of utmost national concern. The present case—involving the question whether racial discrimination in the administration of a charitable trust established to fulfill an important public purpose is beyond the reach of the Equal Protection Clause—has far-reaching implications. We deem it appropriate, therefore, to submit the views of the United States.

STATEMENT

In 1911, United States Senator Augustus O. Bacon executed a will granting a life estate, in trust, in certain designated real property known as "Baconsfield" for the benefit of his wife and two named daughters (R. 12, 18–19). Senator Bacon's will further provided that upon the death of the last surviving beneficiary, the Baconsfield property, including all remainders and reversions,

> shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control

of a Board of Managers of seven persons, at least four to be women and all seven to be white (R. 19). The Board, to be appointed by the Mayor and City Council, was given discretion to open the park to white men and white non-residents of Macon (R. 19–20), and this power has been exercised (R. 7–8). To provide for maintenance of the park, income from other described real property was to be expended by the Board of Managers (R. 20). Senator Bacon stated in his will that he was providing for a park exclusively for whites because he disapproved of the social mixing of the white and Negro races (R. 21).

This suit was brought on May 4, 1963, in the Superior Court of Bibb County, Georgia, by the individual members of the Board of Managers of Baconsfield, in their capacities as members of the Board, against the City of Macon and the trustees of certain residuary beneficiaries of Senator Bacon's estate (R. 5–10). Its purpose was to enforce the racial limitations in the will. It was alleged that the City was "failing and refusing to carry out and enforce the provisions of said Will with respect to the exclusive use" of the park by white persons (R. 8). The plaintiffs asked that the City be removed as trustee, that the court appoint new trustees and that the legal title to "Baconsfield" and any other assets held by the City of Macon as trustee under Senator Bacon's will be vested in the trustees so appointed (R. 9).

The City's answer alleged that it could not legally enforce racial segregation in the park and asked that the court construe the will and enter a decree setting forth its duties and obligations as trustee (R. 32–34). The other defendants admitted the allegations and requested the removal of the City as trustee (R. 34–35).

On May 29, 1963, six Negro citizens of the City of Macon moved for leave to file a petition for intervention on behalf of themselves and other Negroes similarly situated (R. 36). In their petition, filed on June 18, 1963, they asserted that the racial limitation was contrary to the public policy of the United States and the laws of Georgia and that the Superior Court, as an agency of the State of Georgia, could not, consistently with the Equal Protection Clause of the

Fourteenth Amendment, enter an order appointing private citizens as trustees for the purpose of regulating public property in a racially discriminatory manner (R. 40). They asked the court to effectuate the general charitable purpose of the testator to establish and endow a public park by refusing to appoint private trustees (R. 41–42).[1]

On February 5, 1964, the City filed an amendment to its answer alleging that, pursuant to a resolution adopted by the Mayor and City Council on February 4, 1964, the City had resigned as trustee. The City asked that its resignation be accepted and substitute trustees be appointed (R. 50–51). The Negro intervenors subsequently amended their petition, alleging that the Fourteenth Amendment would be violated if the relief sought by the parties was granted (R. 62–63).

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[1] On January 8, 1964, the plaintiff members of the Board of Managers filed an amendment to their original petition, requesting (1) that Negroes be enjoined from using the park, (2) that four previously unrepresented residuary legatees under Senator Bacon's will (the Sparks heirs) be added as plaintiffs, and (3) that the trustees of the Curry heirs, originally joined as defendants, be permitted to assert the interests of the Curry heirs as plaintiffs (R. 42–45). At the same time, the Sparks heirs intervened, the trustees for the Curry heirs sought leave to assert their interests as plaintiffs, and both parties joined in the original plaintiffs' prayers for relief (R. 45–49). Additionally, the Sparks heirs and the trustees for the Curry heirs asked for reversion of the trust property to the Bacon estate in the event that other relief was denied (R. 47, 49). In the decree of the Superior Court, no ruling was made on the requests that Negroes be enjoined from using the park and the conditional prayers for reversion of the trust property were held to be moot (R. 65).

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The Superior Court of Bibb County issued a decree on March 10, 1964, which, *inter alia*, (1) allowed intervention by the Negro intervenors, (2) accepted the resignation of the City of Macon as trustee of the park, and (3) appointed three individuals as new trustees (R. 64–66). The relief sought by the Negro intervenors was denied. Subsequently, all seven of the City-appointed members of the Board of Managers of "Baconsfield" submitted their resignations to the three new court-appointed trustees. The latter then reappointed three of the old Board members and appointed four new members (R. 70–72).

On appeal by the Negro intervenors, the Supreme Court of Georgia affirmed. It held that "A. O. Bacon had the absolute right to give and bequeath property to a [racially] limited class" (R. 87); that charitable trusts are subject to the supervision of the courts (Ga. Code Ann. § 108–202); and that, since the City had resigned as trustee, the Superior Court was authorized to appoint private trustees in its place (R. 86).[2]

The record does not disclose the physical characteristics of Baconsfield. We have therefore attached at the end of our brief a recent map of the City of Macon. It is apparent from the map that Baconsfield

[2] The Supreme Court held further that, assuming the intervenors could properly raise the issue of *cy-pres*, the Superior Court had not erred in refusing to apply the doctrine to this case. The court said that "the facts * * * were wholly insufficient to invoke a ruling that the charitable bequest was or was not incapable for some reason of exact execution in the exact manner provided by the testator" (R. 87).

is one of Macon's largest parks, and its size can be estimated as about 100 acres. It is centrally located, on the banks of the Ocmulgee River, and is traversed by a major interstate highway (Route 16) as well as by several streets which connect with the public streets abutting the park.

ARGUMENT

Introduction and Summary

For many years the City of Macon and its Board of Managers served as trustee and administrator of Baconsfield. During that period, Baconsfield was, in every practical sense, a City park, and, until recently, the City entirely excluded Negroes from the park under the terms of the trust, while freely admitting all white persons who desired to use the park. In thus operating Baconsfield as a park solely for the use of white persons, the City clearly was violating the Fourteenth Amendment. It m[illegible]e no difference that the park was not owned outright by the City, but was merely administered by it under a trust containing a racial exclusion. See *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230 (the *Girard Trust* case); cf. *Guillory* v. *Administrators of Tulane University*, 203 F. Supp. 855 (E.D. La). The Fourteenth Amendment forbids a State to undertake "an obligation to enforce a private policy of racial discrimination" (*Griffin* v. *Maryland*, 378 U.S. 130, 136).

Shortly before this suit was instituted, the City of Macon began to permit Negroes to use Baconsfield. The explicit purpose of the present suit was to reverse that course of action and restore Baconsfield as a segre-

gated facility. The suit was brought in a State court by the members of the Baconsfield Board of Managers against the City and certain heirs of Senator Bacon. The plaintiffs alleged, as a basis for relief, that the City was "failing and refusing to carry out and enforce the provisions of said Will [of Senator Bacon] with respect to the exclusive use" of Baconsfield park by white persons (R. 8). The court was asked to appoint new trustees who would be obligated to exclude Negroes from the park. Six Negro citizens of Macon, who were permitted to intervene in the litigation, urged that the requested relief be denied under principles of State and federal law.

While the suit was pending, the Mayor and Council of Macon resigned as trustees of Baconsfield. Thereafter, the court entered an order accepting their resignation and appointing three new trustees to operate Baconsfield on a segregated basis. The new trustees appointed a new Board of Managers which included three members of the old board appointed by the city. On appeal to the Supreme Court of Georgia by the Negro intervenors, the lower court's order was affirmed.

The basic question thus raised in this Court is whether it is consistent with the Fourteenth Amendment for Baconsfield to be operated by the newly appointed trustees as a facility exclusively for white persons. In rejecting the intervenors' contentions below, both Georgia courts have expressly held that Baconsfield may be so operated.

The Fourteenth Amendment, in providing that "[n]o State shall * * * deny to any person within

its jurisdiction the equal protection of the laws", reaches every form of State-sponsored inequality. The question presented, therefore, cannot be resolved in favor of permitting Baconsfield to remain exclusively a white facility merely by noting that formal legal title to the park has now been transferred by the Georgia courts to trustees who are not members of the City government. As this Court has recognized on a number of occasions, formally "private" conduct may sufficiently assume the character of governmental action or may become so entwined with or dependent upon governmental actions or policies as to become subject to the constitutional limitations placed upon State action.[3] It is our position in this case that Baconsfield has thus become a public facility subject to the Fourteenth Amendment, despite the formal transfer of title and control to private trustees; the Georgia courts therefore erred in deciding that Baconsfield may be operated for the benefit of all the white citizens of Macon while Negroes are excluded.

We base our judgment upon the totality of relevant facts and circumstances bearing on the degree of State involvement, mindful of this Court's warning against attempting to formulate fixed rules or mechanical tests to measure State action in areas of mixed public action and private responsibility (*Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722). Proceeding under this approach, we show that the facts and circumstances of this case demonstrate

[3] See cases cited at nn. 4 to 6, *infra*, pp. 10–11.

"State action of a particular character that is prohibited" (*Civil Rights Cases*, 109, U.S. 3, 11).

VIEWED IN THEIR TOTALITY, THE FACTORS WHICH ESTABLISH THAT BACONSFIELD SERVES A PUBLIC FUNCTION AND THAT THE STATE IS SIGNIFICANTLY INVOLVED IN THE HISTORY AND CONDUCT OF ITS OPERATIONS REQUIRE THE CONCLUSION THAT THE FOURTEENTH AMENDMENT APPLIES

In attempting to determine the point at which State involvement in an activity conducted by private persons gives the activity sufficient governmental character to bring a discriminatory practice within the ban of the Fourteenth Amendment, we look to six major factors which this Court has deemed relevant to such an inquiry: (1) the degree of State paternity and superintendence afforded the discriminating enterprise;[4] (2) the extent of direct State support and maintenance of the activity;[5] (3) the public character of the discriminating enterprise;[6] (4) the impact of the discrimination upon the affected minorities;[7] (5) the extent of State participation in, or encouragement of, the decision to discriminate;[8] and (6) the absence of a significant interest in private determination in

[4] See *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225; *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192; *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451.

[5] See *Burton* v. *Wilmington Parking Authority*, *supra*; *Pennsylvania* v. *Board of Trusts*, *supra*.

[6] See *Smith* v. *Allwright*, 321 U.S. 149; *Terry* v. *Adams*, 345 U.S. 461; *Marsh* v. *Alabama*, 326 U.S. 501.

[7] See *Shelley* v. *Kraemer*, 334 U.S. 1; *Bell* v. *Maryland*, 378 U.S. 226, 329 (dissenting opinion).

[8] See *Peterson* v. *Greenville*, 373 U.S. 244; *Lombard* v. *Louisiana*, 373 U.S. 267.

the management of the enterprise.[9] We suggest below that all of these elements are involved to a substantial degree in Baconsfield. There is thus no need to decide in this case whether any single one of them would, if present in sufficient strength, require a finding that the State is responsible for racial discrimination irrespective of the remaining considerations. The totality of circumstances showing the State's close participation in the establishment and administration of Baconsfield, as well as the public role which the park plays in the community, compels the conclusion that the Fourteenth Amendment forbids the present and any future trustees or operators of the park in its present form to exclude any person on account of his race. Cf. *Eaton* v. *Grubbs*, 329 F. 2d 710 (C.A. 4).[10]

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[9] Cf. *Civil Rights Cases*, *supra*.

[10] The question whether racial discrimination by the private trustees of Baconsfield is forbidden by the Fourteenth Amendment is fully ripe for decision by this Court in this case—as may not have been true in the second *Girard Trust* case (*Pennsylvania* v. *Board of Trusts*, 357 U.S. 570). After this Court held in its first decision (*Pennsylvania* v. *Board of Trusts*, 353 U.S. 230) that the City of Philadelphia could not, as trustee of Girard College, exclude Negroes as directed in the trust instrument, the State court appointed private trustees to replace the city. See *Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844. The Negro plaintiffs again appealed to this Court; but this time the Court, without opinion, dismissed the appeal and, treating the appeal as a petition for a writ of certiorari, denied certiorari. The reason for the Court's action in declining to review the State court's decision can only be conjectured. The Court's disposition, however, was not on the merits. The dismissal of the apepal, as in the first case, was evidently for want of jurisdiction (see *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230); and denial of certiorari, of course, imports no view of the merits. The explanation of the Court's

1. *State Paternity and Superintendence.*—A union shop agreement between a labor union and an employer—both private entities—is subject to constitutional scrutiny where federal law authorizes the making of such agreements. *Railway Employes' Dept.* v. *Hanson,* 351 U.S. 225, 231–232. Likewise, a union is forbidden to exclude Negroes where its authority to act as exclusive bargaining agent derives from federal law. *Steele* v. *Louisville & N. R. Co.,* 323 U.S. 192; *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U.S. 768. The constitutional duty of equal treatment regardless of race has also been imposed on privately owned transportation companies operating under an exclusive franchise granted and closely regulated by the State (*Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451; *Baldwin* v. *Morgan,* 287 F. 2d 750 (C.A. 5); *Boman* v. *Birmingham Transit Co.,* 280 F. 2d 531 (C.A. 5)), and upon privately owned hospitals

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action may lie in the fact that, in view of a State antidiscrimination enactment seemingly applicable to the private trustees of Girard College (Pa. Stat. Ann., Tit. 18, § 4654, expressly forbidding racial discrimination by schools), it was not clear that the private trustees would or could operate Girard on a segregated basis. It was therefore premature to complain that the appointment of the private trustees would perpetuate racial segregation. But it is entirely clear that the private trustees of Baconsfield will continue to operate the park on a segregated basis. The State courts have said they must, and there is no applicable federal law requiring them to admit Negroes. (The public accommodations provisions of the Civil Rights Act of 1964, 78 Stat. 241 *et seq.*, do not cover parks. See § 201(b)(1)–(4).) It is thus indisputable here, as it may not have been in the *Girard Trust* case, that the effect under State law of the State's action in procuring the appointment of private trustees will be to compel adherence to the racial limitation of the trust.

operating under comprehensive State plans to provide medical facilities for the State's citizens (*Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (C.A. 4), certiorari denied, 376 U.S. 938; *Eaton* v. *Grubbs,* 329 F. 2d 710 (C.A. 4)).

The primary rationale of such decisions in that the State may become so intimately involved in the creation and regulation of an enterprise as to make it (though privately owned) an agent of the State. Such an enterprise—in reality the State's creature—is not permitted to avoid the restrictions placed by the Fourteenth Amendment upon State action; nor should persons be compelled to suffer discrimination because governmental ends are thus achieved through nominally private arrangements.

The charitable trust in general, and the charitable trust for park purposes in particular, are, in Georgia as well as other States, a form of "private" enterprise bearing substantial indicia of State paternity and superintendence. In Georgia, the type of trust created by Senator Bacon—establishing a park to be operated by a municipality—is expressly authorized by statute (Ga. Code Ann. § 69–504). Georgia law additionally provides for the enforcement of charitable trusts in equity (Ga. Code Ann. § 108–201) and specially empowers the State Attorney General to enforce them (Ga. Code Ann. § 108–212 (1963 Supp.)); further, as this case shows, equity courts are empowered to appoint new trustees to prevent a charitable trust from failing. Georgia law also provides favorable rules of construction designed to up-

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hold the validity of an attempted charitable trust (Ga. Code Ann. § 108-206-09), waives the Rule Against Perpetuities (Ga. Code Ann. § 69-504; see *Regents of University System* v. *Trust Co. of Georgia*, 186 Ga. 498, 198 S.E. 345; *Pace* v. *Dukes*, 205 Ga. 835, 55 S.E. 2d 367), and grants immunity for negligent torts (*Morehouse College* v. *Russell*, 219 Ga. 717, 135 S.E. 2d 432; *Cox* v. *DeJarnette*, 104 Ga. App. 604, 123 S.E. 2d 16).

These special privileges (and others, see, *e.g.*, p. 15, *infra*) undoubtedly derive in large part from the fact that, like a municipal transit system, or a labor union having broad statutory powers, or a private hospital operating under a comprehensive State health plan, a charitable trust is typically engaged in activity in which there is a high degree of public interest. Since health, recreation, and education are among the central responsibilities of the States to their citizens, the charity hospital, the charitable park (like Baconsfield), charitable museums and libraries, and nonprofit private schools act for the State in the pursuance of public goals.[11] The State fosters private institutions of this kind, providing them with special privileges and benefits, because without such institutions the direct obligations of the State to provide for the welfare of its citizens would be expanded. Such sponsorship is a form of "interdependence" between the public and the private sectors and creates a pattern of "benefits mutually conferred" (*Burton* v. *Wil-*

[11] Sometimes in areas, like sectarian education, which the States are constitutionally barred from entering.

mington Parking Authority, 365 U.S. 715, 724–725). The State grants the charity special advantages to encourage it to assume public responsibilities. The private charity in turn assumes an essentially public function which the State might otherwise have to perform directly, and thereby acquires substantial attributes of a public rather than a private institution.

2. *State Support and Maintenance.*—This Court has said that affirmative "State support of segregated * * * [activity] through any arrangements, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command" (*Cooper* v. *Aaron*, 358 U.S. 1, 19). In this case, the State is significantly involved in the support of Baconsfield within the sense of this doctrine.

First, it grants Baconsfield, in common with other charitable trusts, exemption from taxation (see Ga. Code Ann. § 92–201), thus affording it appreciable financial assistance difficult to distinguish from an outright subsidy. "Tax exemption may attain significance when viewed in combination with other attendant state involvements." *Eaton* v. *Grubbs*, 329 F. 2d 710, 713 (C.A. 4); see *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (C.A. 4); *Simkins* v. *Moses H. Cone Memorial Hospital, supra; Guillory* v. *Administrators of Tulane University*, 203 F. Supp. 855, 863 (E.D. La.).

Second, the State has chosen and appointed the trustees who govern Baconsfield and these trustees are, in turn, answerable to the State court which ap-

pointed them and which exercises a continuing supervisory authority over the administration of the trust.

Third, for many years the City itself was the trustee. The Baconsfield of today is thus a product in substantial measure of actions taken and decisions made during the City's direct custodianship. In addition, three of the City's former park managers are members of the new Board of Managers designated by the court-appointed trustees. The close support and supervision which the City has provided have not been dissipated.

The State, in short, has not only encouraged the creation of Baconsfield to serve a public purpose, but to that end it has lent and continues to lend significant financial support and administrative supervision to the park.

3. *The Public Character of the Park.*—Even without the kind of State support and sponsorship discussed in sections (1) and (2) above, a private person or group permitted by the State to perform a function normally performed largely by government occupies a position comparable to that of a formal agency of the State.[12] Hence, the exercise of constitutionally protected rights on the public streets of a town may not be denied by a private company that owns the town and its streets; a State is not justified in "permitting a corporation to govern a community of citizens so as to restrict their fundamental liber-

[12] "When private individuals or groups are endowed by the State with powers or functions governmental in nature they become instruments of the State and subject to the same constitutional limitations as the State itself." *Baldwin* v. *Morgan, supra,* at 755, n. 9.

ties" (*Marsh* v. *Alabama*, 326 U.S. 501, 509). If the State delegates an aspect of the elective process to the control of private groups, those groups become subject to the Fifteenth Amendment. *Terry* v. *Adams*, 345 U.S. 461; *Smith* v. *Allwright*, 321 U.S. 149; *Nixon* v. *Condon*, 286 U.S. 73; *Rice* v. *Elmore*, 165 F. 2d 387 (C.A. 4). Similarly, where private real estate developers are permitted to impose systems of restrictive covenants, which have substantially the same effects as municipal zoning regulations, the State courts are forbidden to enforce racial restrictions contained in such covenants. *Shelley* v. *Kraemer*, 334 U.S. 1; *Barrows* v. *Jackson*, 346 U.S. 249; see *Bell* v. *Maryland*, 378 U.S. 226, 329 (dissenting opinion).[13]

Baconsfield is not an entire "private" community as in *Marsh* v. *Alabama*, or a large residential subdivision as in *Shelley* v. *Kraemer*. Nor is the public recreational function it serves as vital to the purposes of State government as the "private" elective process involved in *Terry* v. *Adams*, *Smith* v. *Allwright*, and

[13] The principle of the *Marsh* case has been applied in a variety of additional contexts: union activity on private company property (*Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793; *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226; *National Labor Relations Board* v. *Lake Superior Lumber Corp.*, 167 F. 2d 147 (C.A. 6)); private colleges (*Guillory* v. *Administrators of Tulane University*, 203 F. Supp. 855, 859 (E.D. La.)); private railroad terminals (*Baldwin* v. *Morgan*, 287 F. 2d 750, 754–755 (C.A. 5)); the sidewalks of shopping centers (*Freeman* v. *Retail Clerks Local 1207*, 28 U.S. Law Wk. 2311 (Kings County Super. Ct., Washington, decided, December 9, 1959)); and private transit companies (*Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451; *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (C.A. 5)).

Nixon v. *Condon.* Nevertheless, the principle of these decisions—that a private organization which assumes a substantially governmental character must obey the restrictions placed by the Constitution upon governmental action—applies to a significant extent to Baconsfield.

(*a*) The provision of parks for the leisure and recreation of urban dwellers is a traditional function of local government. "In densely populated cities, public parks are manifestly essential to the health, comfort and pleasure of their citizens, and it is generally held that municipalities may acquire land for park purposes." 10 McQuillin, *Municipal Corporations* (3d ed.), § 28.51, p. 123. The State of Georgia explicitly authorizes its municipalities to acquire land for parks, playgrounds and other recreational purposes, and to provide for their conduct and maintenance. (Georgia Code Ann. § 69–602; see *Stubbs* v. *City of Macon,* 78 Ga. App. 237, 50 S.E. 2d 866.) Baconsfield is one of the largest parks in Macon with a distinctly public character. It is 100 acres in size and centrally located. The park contains several streets which connect with the public streets surrounding the park, and is traversed by a major highway. It is an integral part of Macon's park system; if it were closed, the city might well be forced to acquire additional park land to replace it. The existence of several privately endowed parks like it might actually dissuade a city from providing any recreational areas of its own—areas which it would, of course, be constitutionally forbidden to operate on a segregated basis.

(*b*) Apart from its physical characteristics, Baconsfield's public nature is shown by its admissions policy which—unlike that of a private activity—lacks all selectivity (except as to race) with respect to those who are permitted to use the property. There are no qualifications for participation in the use of Baconsfield's facilities, no admission fees, and no memberships or membership requirements. In contrast to a specialized recreational area sponsored by a group that has special interests which bring its members together, Baconsfield is designed to serve the entire community of Macon. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh* v. *Alabama*, 326 U.S. 501, 506.

(*c*) That Baconsfield serves a municipal function is also strongly suggested by the fact that the Mayor and the Council of Macon were designated as trustees in the trust instrument and served in that capacity for many years. Senator Bacon intended Baconsfield to be a public area serving the entire community. Presumably, it was to assure its public character and its community function that he made the City responsible for its management and control. In exercising this function, the City confirmed the municipal character of the park.

(*d*) It is now a settled principle that the lessee or operator of public property may not exclude persons

from such property on racial grounds.[14] This holds true even when the State has only bare legal title and is merely enforcing a racial limitation in a trust instrument. See *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230. It seems apparent that a vital reason behind this rule is to erase the image of discriminatory government.

Regardless of the underlying technical arrangement, the *appearance* of Baconsfield is that of a municipal facility. The City of Macon managed Baconsfield for many years. For all intents and purposes it was a municipal park; and, in appearance and character, it remains indistinguishable from other municipal parks. The appointment of private trustees has not changed this. If Baconsfield remains segregated, whatever the technicalities of the trust arrangement, it will have the appearance of a segregated public facility and be regarded as such by a substantial segment of the community.

4. *Impact upon Racial Minorities.*—One of the elements which may be weighed in assessing State involvement in nominally private discrimination is the discrimination's probable impact on the affected

[14] See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U.S. 971, reversing 202 F. 2d 275 (C.A. 6); *Derrington* v. *Plummer*, 240 F. 2d 922 (C.A. 5), certiorari denied, 353 U.S. 924; *Department of Conservation & Development* v. *Tate*, 231 F. 2d 615 (C.A. 4); *Smith* v. *Holiday Inns of America, Inc.*, 220 F. Supp. 1 (M.D. Tenn.); *Coke* v. *City of Atlanta*, 184 F. Supp. 579 (N.D. Ga.); *Jones* v. *Marva Theatres, Inc.*, 180 F. Supp. 49 (D. Md.); *Nash* v. *Air Terminal Services*, 85 F. Supp. 545 (E. D. Va.); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S.D. W. Va.).

minority. Where a "private" discriminatory arrangement has the same degree of impact upon a minority group as if such discrimination were practiced by a governmental unit, strong reasons are present for applying the standards of the Fourteenth Amendment. Undoubtedly an important factor in the Court's decision in *Shelley* v. *Kraemer*, 334 U.S. 1, p. 17, *supra*, was that racially restrictive covenants are not isolated or localized but, on the contrary, broad and far-reaching in their impact. A system of such covenants blankets a neighborhood with uniform restrictions. Its natural tendency is to create ghettos. It thereby curtails radically the opportunities of the excluded minority group, in a manner and to an extent ordinarily effected only by governmental action. See *Bell* v. *Maryland*, 378 U.S. 226, 329 (dissenting opinion); cf. *Buchanan* v. *Warley*, 245 U.S. 60. The restriction imposed has an even more pervasive character when, as in *Shelley* v. *Kraemer*, it is binding not only on one generation, but on future generations as well; communities may consequently be frozen for long periods of time along rigid racial lines. Effects so profound and enduring are, so far as the prejudiced minority is concerned, equivalent to those produced by legislative action. Clearly, their magnitude far exceeds that of *ad hoc* private discrimination.

As a major public recreational facility reserved in perpetuity for whites, Baconsfield shares important characteristics with the perpetually restricted residential community in *Shelley* v. *Kraemer*. It would be anomalous in the extreme if Baconsfield, a facility

serving a community-wide function, could constitutionally be preserved in perpetuity as a park barred to Negroes, when private owners of surrounding property are precluded by *Shelley* from enforcing racial covenants. Even more important than the impact upon Negroes of an individual public facility to which they can never have access are the wider implications if the restricted operation of Baconsfield is approved. To the extent that the white, but not the Negro, community is served by restricted facilities like Baconsfield, there is correspondingly less incentive for the community to provide adequate facilities to which Negroes would have access. If the present arrangement is permissible in Macon, what is to prevent a Baconsfield in a community where there is only one park? Or, indeed, what is to prevent the provision of other essential public services through racially restrictive private endowments, and a concomitant regression in the operation or creation of municipally owned and State-owned facilities open to Negroes?

As these questions suggest, discrimination by the establishment of a perpetual charitable facility serving a public purpose and open to all but Negroes without charge has more serious portents for the excluded minority than most forms of "private" discrimination. If Negroes are denied access to a particular commercial establishment, the forces of competition will ordinarily induce other establishments to provide the service. But if they are denied the use of free hospitals, parks, libraries, or schools, they may well end up denied access to all or substantially all such

facilities. Private enterprise will not provide such facilities; they are provided by government or by charitable endowments or not at all. Moreover, they typically require substantial capital investments and highly specialized skills and training, and few Negro communities will be able to donate the requisite funds and skills. A Negro "Baconsfield" is not a likely response to the white-only Baconsfield—even if that were a solution which could commend itself to a democratic society.

5. *State Involvement in the Decision to Discriminate.*—State discrimination within the meaning of the Fourteenth Amendment occurs whenever the State actually participates in or significantly influences private decisions to discriminate. See *Peterson* v. *Greenville,* 373 U.S. 244; *Lombard* v. *Louisiana,* 373 U.S. 267; *Robinson* v. *Florida,* 378 U.S. 153. At a number of points in the history of the Baconsfield trust, the State has thus become involved in the actual implementation of racial discrimination. To some extent, this involvement persists.

(*a*) Georgia Code Ann. § 69–504 permits any person to grant a municipal corporation lands in trust "dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance * * * [to] provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only * * *." Section 69–505 authorizes municipal corporations to accept such grants and enforce the racial limitation

by the police power. These statutes were in effect when Senator Bacon executed his will, and the language in which he created the trust was in part borrowed from § 69–504. In this sense, the present case parallels *Lombard* v. *Louisiana, supra,* where public officials encouraged private restaurants to exclude Negroes. See, also, *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 726–727 (concurring opinion).

(*b*) For many years after the establishment of Baconsfield, the City itself managed the park. During most of this period, it systematically excluded Negroes. This was unconstitutional State action. *Pennsylvania* v. *Board of Trusts,* 353 U.S. 230. More important in the present context, however, this past State action may well be directly responsible for the present status of Baconsfield. If the City had not thus unconstitutionally administered Baconsfield as a park for whites only during this long period, it is conceivable that the park, administered privately, would by this time have become an integrated facility. Or, if the failure of the City as trustee had led instead to the withdrawal of Baconsfield from public park use, the City might itself have acquired substitute park property, which it would now be compelled to make available to Negroes on a basis equal with whites (see, also, n. 15, *infra,* pp. 25–26).

(*c*) When the City realized it could no longer constitutionally exclude Negroes from Baconsfield, it began to admit them. Thereupon the Board of Managers of Baconsfield—appointed by the City and a part of the city administration—sued to procure the

appointment of private trustees who would resume the practice of exclusion. This suit, which was not prompted by any private complaint, was also State action. For, so far as appears, "but for the active intervention of the state courts, supported by the full panoply of state power," the Negro residents of Macon "would have been free to occupy the properties in question." *Shelley* v. *Kraemer*, 334 U. S. 1, 19. The clear purpose of the suit was to perpetuate racial discrimination, the gravamen of the complaint being that the City was "failing and refusing to carry out and enforce the provisions of * * * [Senator Bacon's] Will with respect to the exclusive use" of the park by white persons (R. 8). Absent the State's action here, there is strong basis to believe that Baconsfield would have been permitted to become an integrated facility through the acquiescence of all interested parties.[15]

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[15] To be sure, a beneficiary of the trust (*i.e.*, a white person who used the park) could have sued to enforce the racial limitation. See *Duffee* v. *Jones*, 208 Ga. 639, 68 S.E. 2d 699; *Dominy* v. *Stanley*, 162 Ga. 211, 133 S.E. 245; *Harris* v. *Brown*, 124 Ga. 310, 52 S.E. 610. But no such person evinced any interest in suing. A citizen or taxpayer of Macon who was not a beneficiary of the trust could not have sued (*Harris* v. *Brown*, *supra*), and we have found no Georgia case ruling that an heir or residuary legatee of the settlor may enforce a charitable trust; the general rule denies standing to the settlor, his heirs, and contributors to the trust. *Greenway* v. *Irvine's Trustee*, 279 Ky. 632, 131 S.W. 2d 705; *Leeds* v. *Harrison*, 15 N.J. Super. 82, 83 A. 2d 45. Of course, an heir may sue to set a trust aside and obtain the property himself by reversion. Cf. *Silcox* v. *Harper*, 32 Ga. 639; *Cumming* v. *Trustees of Reid Memorial Church*, 64 Ga. 105. But this is a very different matter from enforcing the trust according to its original

(*d*) The City thereafter resigned as trustee. The resolution of resignation (R. 60-61) makes clear that its action in resigning was motivated principally, if not exclusively, by a desire to perpetuate racial discrimination. Cf. *Gomillion v. Lightfoot*, 364 U.S. 339; *Griffin* v. *School Board*, 377 U.S. 218.

(*e*) The State court accepted the City's resignation and appointed private trustees to operate Baconsfield on a segregated basis. The State Supreme Court upheld the lower court's action. Cf. *Shelley* v. *Kraemer, supra.* In short, the case is one where the State, having administered Baconsfield as a segregated municipal institution for many years, has acted to transfer it to private funds in order to perpetuate segregation. In these circumstances, the State bears substantial responsibility for the racial discrimination now enforced by the trustees, albeit they are nominally a private body (see cases cited in n. 14, *supra*, p. 20).

6. *The Effect upon Private Choice.*—The *Civil Rights Cases*, 109 U.S. 3, 11, distinguished between State action subject to the Fourteenth Amendment and purely "[i]ndividual invasions of individual rights", which the Amendment does not reach. This distinction, uniformly followed (see, *e.g.*, *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722),

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tenor. Faced with the prospect of losing Baconsfield to the heirs of Senator Bacon, who might close the park and use the land for other purposes, the City might decide to secure the land by condemnation—in which event it would be constitutionally required to continue to operate it on a non-segregated basis. At all events, the heirs of Senator Bacon instituted no suit, but merely joined belatedly in the suit brought by the Board of Managers.

recognizes that the Fourteenth Amendment, consistently with the spirit and institutions of American life, leaves substantial freedom for private choice in social, business, and professional activities and associations. The Amendment was not intended to raise every instance of personal or private racial discrimination to the constitutional level. Therefore, in determining its application in the disputed borderline area of joint public and private responsibility, it is relevant to consider evidence not only of affirmative State involvement, but of the absence of a substantial interest in protecting the area of truly private choice that the Amendment does not penetrate.

A finding of State action in this case would not intrude upon that area. No issue is presented here as to a property owner's right to decide whom to permit on his premises; and the only private choice effectuated by enforcing the racial limitation in the trust would be that of Senator Bacon, who died many years ago. So far as the living are concerned, Baconsfield is not a private facility used in a private way but a public facility open to all except Negroes. Even less than most commercial establishments, Baconsfield is not a place of intimate or private associations. As a public park open to all (except Negroes), it is a place of strictly transient and casual encounters. It has none of the aspects of a private home or club, where there is a compelling interest in permitting people to be free to choose those with whom to associate. Moreover, the decision to exclude Negroes was not made by

anyone using the park and, for all that appears, there was not even a complaint from the white users when the City admitted Negroes to Baconsfield.

In sum, Baconsfield is, except for its exclusion of Negroes, a truly municipal facility serving a public purpose. The State has not only created the legal framework within which such "private" charitable institutions are established to serve public functions, but it lends them its direct support. In this case, in addition, the State has been intimately involved in the actual discriminatory operation of Baconsfield: The City of Macon administered the park for many years as a facility for whites only—thus inevitably shaping its present character—and this very suit is an example of affirmative State action recently taken to preserve Baconsfield as a public facility entitled to exclude Negroes while admitting all others. The consequence of Baconsfield's continued existence as a segregated facility will be not only to deprive Negroes of equal access to public parks in Macon; there is danger that similar "private" operation of additional public facilities will deprive Negroes of other public services freely available to whites. All of these considerations, as well as the fact that Baconsfield's public character negates any substantial interest in private choice which would be adversely affected should the Fourteenth Amendment be held to apply, lead us to conclude that Baconsfield should be treated as a public institution of a governmental character re-

quired by the Constitution to admit persons without regard to their race.[16]

CONCLUSION

The judgment of the Supreme Court of Georgia, holding that the trustees of Baconsfield are legally obligated, and constitutionally permitted, to exclude Negroes on grounds of race or color, should be reversed.

Respectfully submitted.

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[16] While it is clear, if our views are accepted by the Court, that no one may operate Baconsfield as a segregated park, we think it would be premature for this Court to consider (1) whether the heirs of Senator Bacon may obtain the property by reversion and use it for non-park purposes (*e.g.*, a residential development); or (2) whether the present trustees may close the park. We note, however, that both courses of action would raise constitutional questions. As to the first, see *Guillory* v. *Administrators of Tulane University*, 212 F. Supp. 674, 687 (E.D. La.); cf. *Barrows* v. *Jackson*, 346 U.S. 249, 254; as to the second, see *Griffin* v. *School Board*, 377 U.S. 218.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 61.

E. S. EVANS, et al.,

v.

CHARLES E. NEWTON, et al.,

On Writ of Certiorari to the Supreme Court of Georgia.

BRIEF

Of Respondents, Members of the Board of Managers of Baconsfield.

QUESTIONS PRESENTED.

Here certain land was devised in trust for a park for white persons only. The testator by clear language manifested a disapproval of the idea of any recreation area being open to the members of both the white and negro races. The legal title was to be held by the City of Macon

or its successors in said trust, subject to control by a Board of Managers, composed of private citizens selected as provided in the will.

When negro citizens began to use the park's facilities, the Mayor and Council of the City by formal resolution after institution of suit to remove the City as trustee resolved to resign, declaring it to be "against good conscience" that the City should attempt to remain as title holder to the trust property.

Under these circumstances where the City tenders its resignation as trustee to a court of equity, whether in the midst of litigation seeking its removal or otherwise, is it a denial of constitutional rights of negro citizens of the community for the court to appoint successor trustees and to refuse to command the city to continue to serve?

STATEMENT.

Augustus Octavius Bacon was a soldier in the service of the Confederate States of America and later for twenty (20) years a United States Senator from Georgia. Before his death in 1914, he served for a time as President Pro Tempore of the Senate of the United States. The following quoted excerpts from Items Ninth and Tenth of his will are of crucial importance in evaluating the action of the Supreme Court of Georgia:

> ". . . it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided for; the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized. For the control, management, preservation and improvement of said property there shall be a Board of Managers consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons. The Members of this Board shall first be selected and appointed by the Mayor and Council of the City of Macon, or by their successors in said trust; and all

vacancies in said Board shall be filled by appointments made by the Mayor and Council of the City of Macon, or their successors, upon nomination made by the said Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors. If practicable, I desire that there shall be as a member of said Board of Managers at least one male or female descendant of my own blood, not only in the Board as at first constituted, but at all times thereafter. The said Board of Managers shall at all times have complete and unrestricted control and management of the said property, with power to make all needful regulations for the preservation and improvement of the same, and rules for the use and enjoyment thereof, with power to exclude at any time any person or persons of either sex, who may be deemed objectionable, or whose conduct or character may by said Board be adjudged or considered objectionable, or such as to render for any reason in the judgment of said Board their presence in said grounds inconsistent with or prejudicial to the proper and most successful use and enjoyment of the same for the purposes herein contemplated. The Board of Managers shall have the power to admit to the use of the property the white men of the City of Macon, and white persons of other communities, with the right reserved to at any time withhold or withdraw such privilege in their discretion. To enable the Board of Managers to have a fund for the payment of necessary expenses connected with the management, improvement and preservation of said property, including when possible drives and walks, casinos and parlors for women, play grounds for girls and boys and pleasure devices and conveniences and grounds for children, flower yards and other ornamental arrangments, I direct that said Board may use for purposes of income in

any manner they may deem best that portion of the property that lies Easterly of the road known as Boulevard Baconsfield (more particular description of property omitted), but in no event and under no circumstances shall any part of the property herein conveyed and bounded and platted be ever sold or otherwise alienated or practically disposed of by any person or authority whatsoever, and excepting the portions of the property which may be used for purposes of revenue as aforesaid all the remainder of said property shall forever and in perpetuity be held for the sole uses, benefits and enjoyments as herein directed and specified . . ." (R. 19-20).

". . . I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection (R. 21).

"I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common. I am moved to make this bequest of said property for the use, benefit and enjoyment of the white persons herein specified by my gratitude to and love for the people of the City of Macon from whom through a long life time I have received so much of personal kindness and so much of public honor; and especially as a memorial to my ever lamented and only sons, Lamar Bacon who died on the 21st day of December, 1884, and Augustus Octavius Bacon, Jr., who died on the 27th day of the same year. And I conjure all of my descendants to the remotest generation as they shall honor my

memory and respect my wishes to see to it that this property is cared for, protected and preserved forever for the uses and purposes herein indicated . . ." (R. 21).

". . . If for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under the Charter of the City to hold said fund in trust for the purposes specified, then unless said power is obtained through appropriate legislation, I direct that the powers herein expressed be conferred upon a trustee to be selected by the Mayor and Council of the City of Macon, with such safeguards and restrictions as may be prescribed by them for the perpetual safekeeping and management of the fund. And I give a similar direction if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their Charter to hold in trust for the purposes specified the property designated for said park and pleasure ground, unless said required power is conferred by appropriate legislation . . ." (R. 23-24).

". . . As there will be no one of my descendants who now bears my name either by right of birth, or through voluntary choice, an additional reason is furnished why I should deem it proper that in devoting this property to the uses specified, I should at the same time link their memories with the pleasures and enjoyments of the women and children and girls and boys of their own race in the community of which they once formed a happy part . . ." (R. 24-25).

The will from which the foregoing excerpts were taken was duly probated in solemn form in the Court of Ordinary of Bibb County, Georgia in 1914. After the death of certain life tenants, Baconsfield came into being. Since

the earliest beginnings of this park the Board of Managers has operated it in strict accordance with all of the requirements of Bacon except that for a brief time in the spring of 1963 groups of negro citizens entered the park and began to use the limited facilities there located.

The use of the park's facilities by negro citizens in the spring of 1963 was called to the attention of the City by the Board of Managers (R. 8). The City did not then resign, and the Board of Managers initiated this litigation by filing its petition (R. 5-10) in the Superior Court of Bibb County, Georgia on May 4, 1963, seeking to have the City removed as trustee of Baconsfield.[1] The sole reason for the Board's desire to remove the City was that the Board could not operate Baconsfield for the exclusive benefit of white persons as required by the will while the City held the legal title as trustee.

Also joined as defendants were Guyton Abney et al., as trustees holding certain properties for residuary beneficiaries of Mr. Bacon's estate, i. e., the "Curry heirs".

The City filed an answer (R. 32) declaring its inability to serve as trustee of a charitable trust for the members

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[1] On page 8 of their brief petitioners refer to the actions of the Mayor and Council of the City of Macon as representing "a glaring illustration of state action to enforce segregation". They repeat this theme over and over, as do counsel for the United States. Such statements are totally unwarranted.

The City of Macon enjoys an excellent reputation as a municipality in the field of race relations, and the Mayor and Council have always acted with the utmost responsibility to see that all of the City's citizens have been unhampered in the enjoyment of any rights guaranteed by federal law. Few, if any, cities have a better record in this regard.

Nor did the City as trustee act to enforce "segregation" at Baconsfield. Rather, it is apparent that this suit arose only because when Negroes first sought admission at Baconsfield in 1963 the City acted just as it acts in relation to its own parks. As appears from paragraph 10 (R. 8) of the Board's petition the City was "permitting the continuous use of said premises by members of the colored race . . . in complete disregard and violation of the explicit mandate of the testator . . ."

of one race. It prayed that the Court enter a decree setting forth its obligations and duties under the circumstances (R. 34). The trustees for the Curry heirs filed an answer admitting all of the allegations of the plaintiffs, members of the Board of Managers, and also praying for the removal of the City as trustee.

Thereafter on May 27, 1963 the Board of Managers filled a motion for summary judgment on the pleadings (R. 35).

On May 29, 1963, six negro citizens of Macon, Georgia who are the petitioners in this Court, moved to be allowed to intervene in the proceeding (R. 36), and their motion was granted. In paragraph 2 of their motion (R. 37), they alleged that if the prayers of the plaintiffs were granted they and other negro residents of the City of Macon similarly situated would be irreparably harmed and damaged in that they would be deprived of the use of the park. On June 18, 1963 they filed an "Intervenors' Petition" (R. 38) on behalf of themselves and "other Negroes similarly situated as a class". They maintained that the Board of Managers was an agency of the City (R. 39), that the racial limitation in the will was violative of the public policy of the United States and of the Constitution and laws of Georgia, that the Superior Court would violate the Equal Protection Clause of the Fourteenth Amendment if it appointed private successor trustees "who in such capacity as trustees could operate and maintain Baconsfield Park upon a segregated basis". As a "Second Answer and Defense" (R. 41) they stated that while a racially restricted charitable trust could have been enforced in the courts at the time of the probate of Bacon's will, such was no longer the case because the law "has changed". Finally, they prayed (R. 41) that the Court not remove the City but rather that it effectuate "the general charitable purpose" of the testator to establish a "public park".

On January 8, 1964, the "Sparks heirs" were allowed to intervene (R. 45), and they prayed that the City be removed as trustee. As a secondary prayer they asked that unless some order should be granted assuring the future use of Baconsfield in accordance with the will of Bacon with regard to the racial limitation, the property be held to revert into the estate. On the same day the trustees for the "Curry heirs" made the same requests (R. 47). Both sets of heirs requested that negro citizens of the community be permanently enjoined from entering the premises of Baconsfield, and the Board of Managers also concurred in this prayer for an injunction (R. 43).

Thereafter on February 4, 1964, the Mayor and Council of the City of Macon by formal resolution (R. 51-61) determined to resign as trustee of Baconsfield, stating (R. 61), that "it is the considered opinion of the Mayor and Council that it is against good conscience for the City of Macon to continue to serve as Trustee under said will under circumstances where as such trustee it cannot carry out the plain and unambiguous terms of the trust". On the following day the City of Macon amended its answer, thereby resigning the trust (R. 50-62).

On March 5, 1964, petitioners as intervenors in the Superior Court of Bibb County, Georgia, amended their petition (R. 63), reiterating their position that the appointment of private trustees would deny them the equal protection of the laws. They further contended that Bacon's racial limitation "was dictated" by Georgia Code, Section 69-504, which statute they alleged to be unconstitutional. They stated that Georgia Code, Section 108-202 (dealing with cy pres), required that the "racially discriminatory provision" in the will be declared null and void.

On March 10, 1964, the judge of the Superior Court entered an order (R. 64) reciting that the City of Macon

having submitted its resignation as trustee of Baconsfield, the resignation was accepted by the Court, and under the principle that a trust should never fail for want of a trustee, it became the duty of the Court to appoint new trustees to serve in lieu of the City of Macon. The Court thereupon appointed three private citizens to serve in that capacity. No injunctive relief was granted. It was deemed unnecessary to pass upon the secondary contentions of the heirs as to a possible reversion. The Court retained jurisdiction for the limited purpose of replacing any one of the three trustees who might be unable to serve.

These three persons accepted the trust (R. 67), and no supersedeas having been obtained by any party wishing to appeal from that judgment, they quite rightly entered upon their duties as trustees of Baconsfield. As set out in a motion to substitute parties defendant in error filed in the Supreme Court of Georgia (R. 70-76), the members of the Board of Managers as constituted at the outset of this litigation submitted their resignations in writing to the new trustees (R. 73). Subsequently the three successor trustees accepted the resignation of the Board members (R. 74) and appointed a new Board including four persons who had never served in that capacity at any previous time. Thereafter the seven newly appointed persons accepted their appointment to the Board of Managers in writing (R. 75).

Those who are petitioners here prosecuted an appeal to the Supreme Court of Georgia. In their Bill of Exceptions (R. 1) they contended that the trial court's order denied equal protection to them and to the class they represented because it "has the effect of prohibiting Negroes from the use of the park" and because it had the effect of enforcing racial clauses which they contended were originally "commanded" by the State through Georgia Code Section 69-504. They further contended that Georgia Code Section 108-202 (one of two Georgia

Code Sections dealing with cy pres) required that the racial limitation be declared void. The City of Macon filed no brief and made no appearance.

On September 28, 1964, the Georgia Supreme Court unanimously affirmed the decision of the Superior Court of Bibb County (R. 81-88). A rehearing was denied without any opinion on October 8, 1964 (R. 92).

In closing our factual statement we wish to comment on a map attached to the back cover of the brief filed on behalf of the United States. Baconsfield may be observed by looking down from the letter "G" and by looking across from the numeral "5". This was not, of course, a part of the record in the case. In the event that the Court should choose to examine this map, we wish to make certain statements about its accuracy.

This map gives the impression that Baconsfield is traversed by a United States highway. Indeed, counsel for the United States have so construed the map in their brief. Actually, this highway is not now and never has been open but is in a state of preparation. Furthermore, it lies entirely outside of the developed area of Baconsfield Park. The green area on the map which would appear to be labeled "Baconsfield Park" covers a great deal more than the developed park area. That green area from the point where it touches the river going north to a point beyond the proposed highway has been for many years an undeveloped area of river bottom subject to periodic flooding. It is through this area that the highway will lie. This is not and cannot economically be made a part of the park.

Mr. Bacon may have held title to all of that area down to the river, but the park extends only a few feet south of the road labeled "W. G. Lee Boulevard". Nor are there any proposed road connections between this highway and Baconsfield. Nor does any part of Baconsfield

lie to the east of the bridge crossing the river, though the map seems to include another small undeveloped area adjacent to the river and east of the said bridge.

THE BOARD OF MANAGERS OF BACONSFIELD.

The Board of Managers of Baconsfield, the plaintiff in the trial court, has been continually referred to by petitioners as an agency of the City of Macon. Counsel for the United States at page 24 of their brief go so far as to call the Board "a part of the city administration". Nothing in the record or in the facts as they exist outside the record justifies such characterization of the Board, which indeed is totally foreign to the reality of the situation.

The Board is not the agent of the City but of Mr. Bacon. He created the Board in his will (R. 19) and prescribed its membership and its duties and functions. It would always have seven members, all of whom would be white, four of whom would be women and one of whom where practicable would be one of his descendants. The City's only tie was that the Mayor and Council should appoint the original Board at his direction, and the City or any successor trustee should fill vacancies on the Board upon "nomination" made by the Board and "approved" by the trustee (R. 19). The will does not give the Mayor and Council or any trustee or trustees who might succeed it any power to remove a Board member. Rather such members serve for life or until they see fit to resign. They are not, and have not been, compensated by the City or anyone else.

Of vital significance is the fact that the City as the passive title holder exercised no control over this Board. Rather the Board had (R. 19) at all times the complete and unrestricted control and management of the property with power to make all needful regulations for its preservation and its use and enjoyment. Also, the Board, rather

than the City, was supplied with independent income from the trust properties for the payment of necessary expenses for management, improvement and preservation of the park (R. 20). The Board is given the power to exclude any person of either sex deemed objectionable by the Board (R. 19). In none of its duties is it made answerable to the trustee.

The Petition for Certiorari suggested at page 12, in what counsel admitted was a presumption, that until this litigation the Board had been represented in its legal affairs by the City Attorney. However, the Board has at no time been represented by the City Attorney, but in all of its legal affairs, such as leasing the Bacon property which provides the income for the upkeep of Baconsfield, it has been represented by private counsel. In making this statement, we step outside the record, but we fear that we must answer or be thought to acquiesce.[2]

If we concede that any body appointed by another is to be considered henceforth as its servant without any regard to the question of any right of control, then we reach the untenable conclusion that this Court is a mere agency of the President of the United States.

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[2] Augustus Octavius Bacon Sparks, a grandson of the testator, was until his death in the spring of 1964 a member of the firm presently representing the Board of Managers in this litigation. He had always taken great pride in his illustrious grandfather and great interest in the development and operation of Baconsfield. He had for many years served as counsel for the Board of Managers. When his health declined, the Board looked to other members of his firm.

Petitioners attribute some significance to the fact that this firm, i. e., Jones, Sparks, Benton & Cork, also represented the Sparks heirs and the trustees for the Curry heirs in this case. However, it was only natural that these descendants of the Senator in their desire to see his will respected in the courts should look to the firm with which they had family ties. A. O. B. Sparks, Jr. is a member of the firm also, and Willis B. Sparks, III, another great-grandson of Senator Bacon, is associated there in the practice of law.

Petitioners and the United States rely on **Pennsylvania v. Board of Trusts,** 353 U. S. 230, for their assertion that the Board of Managers is an agency of the City. But the Board of Directors of City Trusts there involved was created by the Pennsylvania General Assembly by an Act of June 30, 1869. That Act made the Board of City Trusts answerable to the State of Pennsylvania for all of its actions, and described it as a part of the City government of Philadelphia.[3] The Mayor and the Presidents of the Select and Common Councils served on the Board. The Board administered not just the Girard trust but all eighty-nine charitable trusts of which the City of Philadelphia was trustee (See 127 A. 2d 287). Its correspondence bore the letterhead of the City, and the treasurer of the City of Philadelphia was the treasurer of the Board.

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[3] Justice Musmanno dissenting *In Re Girard's Estate,* 386 Pa. 548, 127 A. 2d 287 (1957), said at 127 A. 2d 322 and 323:

> "Through this Board and through periodical examinations, visits, and audits, the General Assembly maintains a direct supervision over the College and its activities. The Board is required to report annually to the City Council, to the State Legisature, and to the Court of Common Pleas, publishing its reports in the Philadelphia newspapers. The City Controller is required to audit the accounts. The Act makes the members of the Board city officers . . . How can it be doubted that in creating the Board of City Trusts the General Assembly intended to bring into being a governmental agency? The enabling Act provided that all duties, rights and powers of the City of Philadelphia with respect to property dedicated to charitable uses or trusts are to be discharged by the City 'through the instrumentality of a Board composed of fifteen persons including *the mayor of said city, the presidents,'* etc., 'who shall exercise and discharge *all the duties and powers of said city . . .*'. The Board is directed *'in the name of the . . . City . . .* to make all necessary arrangements, and for and *in the name of the said City* to do, perform and discharge,' all necessary acts in the discharge of the trust. And then, as if to eliminate the possibility of questions in the future as to the authority of the Board, the Act specifically declares that 'the said directors, in the discharge of their duties, and within the scope of their powers aforesaid, *shall be considered agents or officers of said city*' . . ." (Emphasis is that of the Pennsylvania justice.)

However, even if the Board of Managers of Baconsfield as constituted at the outset of this litigation were deemed a state agency, its action may not be viewed as state action denying any "rights" of petitioners since they have no "rights" in regard to Baconsfield. Further, the removal of the City as trustee was also prayed for by Bacon's heirs. Counsel for the United States suggest that heirs may not enforce a charitable trust. But see **McGee v. Vandeventer,** 326 Ill. 425, 158 N. E. 127 (1927). Nor can it matter who were parties plaintiff in Bibb Superior Court, since the Mayor and Council resigned, an action which the City might have taken at any time without any suit at all having been filed.

Further, petitioners, in appealing from Bibb Superior Court to the Supreme Court of Georgia from the order appointing private trustees, obtained no supersedeas. Therefore it was quite proper for the three new trustees to begin functioning as such. As already noted, when the Board of Managers which had filed this action tendered its resignation to the new trustees (R. 73), they accepted that resignation (R. 74) and thereafter appointed a new Board of Managers (R. 74) of whom four members had never served on the Board at any previous time. These four persons were made parties defendant in error in the Supreme Court of Georgia (R. 79). Consequently, the Board of Managers as it presently exists has not even that slight tie with the City which petitioners formerly claimed to exist through the appointments.

Counsel for the United States in the footnote on page 25 of their brief speculate that perhaps the beneficiaries were content with the City's trusteeship since they didn't sue.

However, those who favored the City's removal were represented by the Board of Managers. There was no reason for them to sue. If any favored the view of petitioners they were free to join with them, but not a single member of that large class did so.

THE SCOPE OF THE GEORGIA SUPREME COURT'S DECISION.

While we think that the present Board of Managers of Baconsfield under an appointment by private persons serving as trustees may operate the park for the exclusive benefit of the class of persons clearly intended and defined as beneficiaries of Senator Bacon's will, and that a decision of the Georgia Supreme Court so holding would be correct and would not raise any federal question, we do not think the Georgia Supreme Court reached that question. At the beginning of its decision that Court carefully analyzed (R. 85-86) the action of Bibb Superior Court, and said:

> ". . . After determining that all parties were properly before the Court, the decree did two things: (1) Accepted the resignation of the City of Macon as trustee of Baconsfield; and (2) appointed new trustees."

The Georgia Supreme Court observed (R. 85) that those who are petitioners here asserted in that Court that the trial judge's decree was "patent enforcement of racial discrimination contrary to the equal protection clause of the Fourteenth Amendment," but, said the Court (R. 85):

> ". . . The decree did not enforce, or purport to enforce, any judgment, ruling, or decree as related to the intervenors . . ."

(The intervenors referred to are, of course, the petitioners here.)

In this manner the Georgia Supreme Court made it clear what limited action of the trial court it was called upon to review, and what would be the scope of its decision.

It then applied normal rules of trust law, observing (R. 86) that the trustee had resigned, and that the trial judge "was confronted with the commandment of Code

Section 108-302 that a trust shall never fail for the want of a trustee" and "being empowered to appoint trustees when a vacancy occurs for any cause" he appointed successors.

It is true that the Court observed (R. 87) that "A. O. Bacon had the absolute right to give and bequeath property to a limited class." But this must be read in light of the preceding sentence where the Court says that racial limitations in gifts "standing alone" are not invalid.

Then to remove any lingering doubts about the limits of its decision the Court noted further (R. 87):

> ". . . the facts before the trial judge were wholly insufficient to invoke a ruling that the charitable bequest was or was not incapable for some reason of exact execution in the exact manner provided by the testator . . ."

Finally at the close of the opinion (R. 88) the Court said:

> ". . . In so far as the **Girard College Trusteeship** case is applicable on its facts to the present case, it supports the rulings we have made."

In expressing doubt as to the applicability to the facts of this case of the Supreme Court of Pennsylvania's decision in the **Second Girard College Case**, i. e., **In Re: Girard College Trusteeship**, 391 Pa. 434, 138 A. 2d 844 (1958), appeal dismissed and certiorari denied, 357 U. S. 570, the Court again obviously had in mind that while the **Second Girard College Case** involved a review of actions in which private trustees excluded Negroes from Girard College, the instant case involved only the resignation of a trustee.

In summary then, the Georgia Supreme Court's decision rests on independent state grounds having a fair and

substantial basis. No federal question has been decided, nor has state law been applied in any unusual fashion to defeat claims of federal rights.

It was unnecessary for the Georgia Supreme Court to ponder whether Baconsfield may be operated solely for white persons. For regardless of the answer to that question the City might still resign. No principle of law requires that every charity open to all races have a municipal corporation as trustee. Hence any decision by this Court on that broader question would be a mere advisory opinion. **Murdock v. Memphis**, 20 Wall. 590.

Petitioners and the United States both say, in arguments with which we totally disagree, that the Board of Managers may not operate Baconsfield exclusively for white persons even with private trustees holding the legal title. Hence also under their view of the case there is no reason for this Court to render a decision on the propriety of the change in trustee.

In view of this Court's grant of certiorari we will, of course, argue in this brief the broader question of whether or not Baconsfield may be operated for the exclusive benefit of white persons. However, we respectfully repeat herein, perhaps with greater clarity, the position taken in opposition to certiorari and wish to make further argument without abandoning that position.

SUMMARY OF ARGUMENT.

Since **Trustees of Dartmouth College v. Woodward,** 4 Wheat. 518, it has been recognized that charitable trusts have an existence free from governmental control, and this is true though the trust may perform functions also performed by the State.

The Fourteenth Amendment makes no reference to race. It prohibits the states from making any purely arbitrary classifications. Thus, if a charity for the members of one race is invalid, so is a charity for the members of a particular religious group.

A decision such as is desired by petitioners would strike a terrible blow to the law of charitable trusts, for the creation of a charity is entirely dependent upon the faith of the prospective donor that the disposition he makes of his property is immutable, and that his bounty will flow forever in accordance with his intent.

Petitioners insist that Senator Bacon's racial clauses should have been treated as "pro non scripto", and that the Superior Court should have refused to accept the City's resignation, thereby insuring that Baconsfield would henceforth exist as a park open to the people of all races. However, even in **Shelley v. Kraemer,** 334 U. S. 1, where a state court was prohibited from enforcing a restrictive covenant in a deed because that action violated a right guaranteed under a federal statute, this Court noted that such covenants "standing alone" are not invalid. Further, since Senator Bacon expressly disapproved of recreational grounds to be used by the white and negro races together (R. 21), any order that would insure a "desegregated" Baconsfield, would have violated all concepts of cy pres as understood in this country. A settlor's property could be put to a use of which he expressly disapproved only under the doctrine of the royal prerogative or sign man-

ual. But that doctrine is no part of the law of Georgia. **Jones v. Habersham**, 107 U. S. 174.

Further, it is apparent from the will that the trusteeship of the City of Macon, unlike the racial restriction, was not in Senator Bacon's mind an essential and indispensable part of his trust plan. He creates a park (R. 19) for the sole use of "white women, white girls, white boys and white children" and in the same sentence provides that the property shall never be devoted to any other purpose or use. However, he nowhere provides that Baconsfield shall have no other trustee. Nor is there anything in his trust purpose that requires a municipal trustee. Indeed, he minimized the role of the City by providing for a Board of Managers which should have (R. 19) "complete and unrestricted control and management" of the park. Further, he expresses doubt as to whether or not the City of Macon has the charter power to act as trustee (R. 24) of his trust, but he goes ahead with it, nevertheless, and provides for the contingency of the City's being unable to serve (R. 24).

Petitioners speak over and over of "discrimination" by the City of Macon in resigning the trust and by the Superior Court in accepting that resignation. However, it was Senator Bacon and not these agencies who selected the class of beneficiaries. It has been well settled since the **Civil Rights Cases**, 109 U. S. 3, that the Fourteenth Amendment forbids only that discrimination which "may fairly be said to be that of the States" (334 U. S. 13). If Senator Bacon's choice of his beneficiaries must be ascribed to the state because the state and its agencies did not prevent his making it or because they did not depart from normal principles of trust law to render it ineffective after his death, then the decision in the **Civil Rights Cases**, 109 U. S. 3, is without meaning.

Shelley v. Kraemer, 334 U. S. 1, hurts petitioners rather than helping them. There it was held that enforcement of

restrictive covenants by state courts denied persons **rights guaranteed by federal statutes.** But no law guaranteed petitioners a right to share in Senator Bacon's gift. Rather they have no "rights" in connection with Baconsfield, and their contentions based on **Shelley** amount to no more than an assertion that they may create such rights by asserting them in a state court and having them denied.

Only the "white women, white girls, white boys and white children of the City of Macon" (R. 19) have rights in connection with the facilities of Baconsfield. Nothing in the record suggests that Baconsfield affords sufficient space to accommodate all the people of Macon. Such could hardly be imagined to be the case. Thus for the Superior Court to have required the City to continue to serve as trustee would have been state action denying to those named beneficiaries of Senator Bacon solely because of their race the right to enjoy unimpaired the full benefits of his gift unshared by others in the same way that any class of beneficiaries enjoys the bounty of its settlor. This would have indeed offended the principles enunciated in **Shelley.**

Georgia Code Section 69-504 (Acts 1905, p. 157), so heavily relied upon by petitioners, and set out at page 3 of this brief, is not in our view a significant consideration. Prior to its passage a settlor could have established a trust for a park with a municipal corporation as trustee open to all races or restricted to one race. The language of 69-504 is permissive. As noted by the Supreme Court of Georgia (R. 86):

> "The law of Georgia does not by Code Section 69-504, nor by any other statutory provision, require that any testator shall limit his beneficence to any particular race, class, color, or creed . . ."

Nor was there any danger that Bacon, despite the permissive language of the statute, might have thought that

it embodied a state policy requiring separate parks for the two races since the State of Georgia had no law restricting its own parks as to race. Nor has the City of Macon ever had any municipal ordinance to that effect.

No Georgia law, then, required Senator Bacon to limit his bounty to the members of one race nor placed any burden on any person desiring to establish a park for all races. Trusts for one race have always been recognized in the case law of the states. Bacon should not be denied the right to create such a trust just because the authorization to do so in Georgia also existed in Code form.

Further, passages in the will (R. 21) give Bacon's personal reasons for the limitation of his park as to race. For this additional reason it is impossible to attribute the racial clauses to any governmental policy.

Moreover, Bacon (R. 24) expressed some doubt as to whether the City of Macon could serve as trustee for the purposes he outlined. It follows either that he was unaware of Georgia Code Sections 69-504 and 69-505, or the passages expressing that uncertainty were carried over from a will which preceded the passage of those Sections. If the latter be the case, then Bacon had in mind a racial limitation before 1905 when these Sections were enacted, for his only doubt about the City's power to serve could only have related to the fact that the trust was for only a portion of its citizens.

ARGUMENT.

I. The Private Nature of Charitable Trusts.

In **Shelley v. Kraemer**, 334 U. S. 1, this Court said:

> ". . . Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful . . ." (334 U. S. 13).

The classic expositions on the independence of the charitable trust from government is embodied in the detailed opinion of this Court in **The Trustees of Dartmouth College v. Woodward**, 4 Wheat. 518.

In that case it appeared that certain persons had given property in trust for the establishment of a school, and that in 1769 King George, III, at their request, and in appreciation of their generosity had issued his letters patent establishing the school in the Colony of New Hampshire in accordance with provisions proposed by the donors. The school was operated by a self-perpetuating twelve-man board provided for in the letters patent until 1816, when the New Hampshire Legislature, feeling that the school was inadequate to meet the needs of changing times and the increasing population of what had become the State of New Hampshire, passed an act entitled "An act to amend the charter, and enlarge and improve the corporation of Dartmouth College."

The Act expanded the twelve-man board to twenty-one, and the board was in certain matters made subject to the veto power of a new Board of Overseers. The members

of this new Board would be appointed by the Governor and Council of New Hampshire, and high governmental officials of Vermont and New Hampshire would serve on it as ex-officio members.

The former board resisted contending that the Act violated the Constitution of the United States in that it impaired the obligations of a contract.

Daniel Webster, speaking for the legality of the Act, took the position that the College was a public institution. Further, he argued, as petitioners argue here, that the private origin of the charity might well be ignored, his reason being that the donors were dead and gone and hence unavailable to assert any interest.

The Supreme Court of the United States, however, ruled in favor of the old board and against the constitutionality of the Act. Chief Justice John Marshall, while conceding that the dead may not be said to hold an interest in property, observed that the donors were well represented by a dutiful board of trustees and said:

> ". . . Those who are no longer interested in the property, may yet retain such an interest in the preservation of their own arrangements as to have a right in insist that those arrangements shall be held sacred . . ." (4 Wheat. 630).

To determine whether the Act complained of was an impairment of the obligations of a contract Chief Justice Marshall noted that it must be determined whether in legal contemplation the charitable trust was essentially "public" or "private":

> "The parties in this case differ less on general principles, less on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction

of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States.

"But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, . . ." (4 Wheat. 629-630).

But, argued Daniel Webster, the privileges bestowed on Dartmouth College by its Charter, such as immortality and those other privileges which normally appertain to charitable trusts, had bestowed on the College such a public nature that the Act of the New Hampshire Legislature was not unconstitutional. To this argument Chief Justice John Marshall said:

". . . Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument than a natural person exercising the same powers would be. . . . Because the government has given it the power to take and to hold property in a particular form, and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be

applied? This principle has never been asserted or recognized, and is supported by no authority . . ." (4 Wheat. 636-637).

The Fourteenth Amendment makes no mention of race. It forbids the states to make any purely arbitrary classification. Thus, if a charity limited as to race is not constitutional neither is one limited as to religion. This point is well put in the concurring opinion of the Supreme Court of Pennsylvania **In Re: Girard's Estate**, 386 Pa. 548, 127 A. 2d 287 (1957), at 127 A. 2d 318:

> "If the present contention of the City is correct, its effect will be catastrophic on testamentary church and charitable bequests, as well as on the law of Wills in Pennsylvania. The Constitutional prohibition against discrimination—the Fourteenth Amendment—is not confined to color; it prohibits the States from making any discrimination because of race, creed or color. It follows logically and necessarily that if an individual cannot constitutionally leave his money to an orphanage or to a private home and college for poor white male orphans, he cannot constitutionally leave his money to a Catholic, or Episcopal, or Baptist, or Methodist, or Lutheran, or Presbyterian church, or to a Synagogue for Orthodox Jews, or to a named Catholic Church or to a named Catholic priest for Masses for the repose of his soul, or for other religious or charitable purposes. That would shock the people of Pennsylvania and the people of the United States more than a terrible earthquake or a large atomic bomb."

Petitioners assert that under certain Georgia Code Sections providing parks is a governmental function, and that perhaps the Court can rule that trusts performing such functions are covered by the Fourteenth Amendment while leaving other trusts beyond the reach of that Amend-

ment. But it certainly does not follow because some parks are state owned and state operated that parks which are the subject matter of charitable trusts must be considered as having a public nature such that they too must be operated in accordance with the Fourteenth Amendment.

In **Trustees of Dartmouth College v. Woodward,** 4 Wheat. 518, Chief Justice Marshall said:

> "That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor becomes the law of the donation? . . ." (4 Wheat. 634).

The Chief Justice, of course, answered that question in the negative.

If the Fourteenth Amendment be held to apply to all trusts that perform functions also performed by government, then religious schools are at an end. However, this Court has recognized the right of such schools to an existence quite independent of public schools. **Pierce v. Society of Sisters,** 268 U. S. 510.

Petitioners argue further that Baconsfield must be considered subject to the limitations of the Fourteenth Amendment because it takes the place of a public park. But in legal contemplation the charitable trust does not take the place of a public institution. To Daniel Webster's argument on that point, Chief Justice John Marshall said:

". . . These eleemosynary institutions do not fill the place, which would otherwise be occupied by government but that which would otherwise remain vacant . . ." (4 Wheat. 647).

At page 18 of their brief, counsel for the United States argue that several privately endowed parks like Baconsfield might be established in a city thus dissuading the city from providing recreational areas of its own. Thus Negroes might have no park. But this is not borne out in experience as to playgrounds, parks, schools, libraries, hospitals or other areas of similar public interest.

In **Marsh v. Alabama**, 326 U. S. 501, relied on by petitioners, the Gulf Shipbuilding Corporation had assumed a function which is normally exercised exclusively by the state, i. e., the function of running a town where people live and carry on the full ambit of human activity. And what concerned this Court was that the Corporation as owner of the title to the entire area including the sidewalk where Grace Marsh was arrested while distributing religious literature was completely closing off the people of an entire community from the free circulation of literature:

"Many people in the United States live in company-owned towns. There people, just as residents of municipalities, are free citizens of their state and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored . . ." (326 U. S. 508).

By contrast, Senator Bacon did not put a town on his property. Petitioners say, however, that he did open it up for a park which is "inherently a part of the public life of the community". However, he specifically set out

the purposes for which his property might be used and expressly empowered (R. 19) the Board of Managers which he created with unlimited discretion to exclude at any time any person or persons of either sex, whom they might find objectionable or whose presence in the park they might deem inconsistent with or prejudicial to the use of the area for the purposes contemplated.

Nor do **Simkins v. Moses H. Cone Memorial Hospital,** 323 F. 2d 959 (4th Cir. 1963), certiorari denied 376 U. S. 938, and **Eaton v. Grubbs,** 329 F. 2d 710 (4th Cir. 1964), support petitioners' position that all private groups performing functions also performed by the state are subject to the Fourteenth Amendment.

In **Eaton** it appeared that the hospital had obtained large sums of money from the United States pursuant to an act which provided that funds should be distributed on the basis of need without regard to race. Even more important was the fact that the City and County there involved had granted the building and lands to the hospital board with a reverter clause by which the property would revert to them if it ceased to be used as a hospital. Thus the City and County rather than a private testator put this property in use as a hospital. The Fourth Circuit likened this situation to the lease in **Burton v. Wilmington Parking Authority,** 365 U. S. 715.

In **Simkins,** the Fourth Circuit said:

> "By far the most significant governmental contact of these two hospitals is their participation in the federally assisted Hill-Burton hospital system . . . We deal here with the appropriation of millions of dollars of public monies pursuant to comprehensive governmental plans . . ." (323 F. 2d 962, 967).

Of course the deterring effect on prospective settlors of charitable trusts of a decision such as is desired by peti-

tioners would be stultifying. As Chief Justice Marshall also observed in **The Dartmouth College Case**:

> ". . . It requires no very critical examination of the human mind to enable us to determine that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time that an act of incorporation constitutes no security for the institution; believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature . . ." (4 Wheat. 647-648).

And Justice Storey concurring said:

> ". . . who ever thought before, that the munificent gifts of private donors for general charity became instantaneously the property of the government; and that the trustees appointed by the donors, whether corporate or unincorporated, might be compelled to yield up their rights to whomsoever the government might appoint to administer them? If we were to establish such a principle, it would extinguish all future eleemosynary endowments; and we should find as little of public policy as we now find of law to sustain it" (4 Wheat. 672).

Nor in calculating the damage to the law of charities does it matter whether the law that impairs the operation of a charitable trust in accordance with the will of the donor is one passed after his death or one in existence at the time of writing his will but given an interpretation absolutely unforeseeable at the time of the execution of his said will.

In this connection, we note that petitioners conceded in their "Intervenors' Petition" in the Superior Court

of Bibb County, Georgia (R. 41) that Bacon's will was valid when written and that Baconsfield might then be legally operated for the exclusive benefit of white persons. Since the wording of the Fourteenth Amendment has not changed since 1914, we understand petitioners to argue in substance that this trust is a victim of changing times. Neither the brief of petitioners nor that of the United States suggests that the Fourteenth Amendment was **intended** to include charities.

And if an essential feature of a will may be rendered unenforceable in the name of the Fourteenth Amendment, no reason appears why such a result will not obtain in future cases having no connection with that Amendment.

At page 27 of their brief petitioners assert that if the State of Georgia acting through its legislature or courts had determined that the operation of parks for only one race was unlawful Baconsfield would not exist in its present form. That is certainly true. It is also true that Baconsfield would not exist at all in any form, for the testator expressly disapproved of park areas to be used by the white and negro races together (R. 21). This illustrates one good reason for holding the Fourteenth Amendment to be inapplicable to charities. A decision such as is desired by petitioners would simply prevent the creation of trusts by persons who want to benefit only the members of one race. A trust benefiting some people is, we submit, better than no trust at all.

To comment further on the repeated use of the word "public" by petitioners and by the United States, it seems that throughout their briefs they move imperceptibly from the notion that a privately created trust is a public charity to the idea that it somehow partakes of public property or of a governmental character. While the term "public charity" has been variously defined it certainly denotes something other than a governmental

tie.[4] The word "public" in this sense has reference to the indefinite nature of the class of beneficiaries.[5]

Respondent members of the Board of Managers of Baconsfield do not suppose, of course, that the members of this Court, if contemplating the creation of a park by a will, would insert a racial limitation. The question, though, is not what seems wise or reasonable or desirable to the Court as men, but what is legal. In **Vidal et al. v. Girard's Executors**, 2 How. 127, Daniel Webster attacked the Girard trust partly on the ground that Stephen Girard had forbidden visits by ecclesiastics, missionaries, and ministers of any sect and the teaching of any sectarian dogma at the College. This, said Daniel Webster, was contrary to the common law and the public policy of Pennsylvania.

Justice Storey speaking for a Court which was unanimous in upholding the will said in response:

> "In considering this objection, the Courts are not at liberty . . . to consider whether the scheme of education by him prescribed, is such as we ourselves should approve, or as is best adapted to accomplish the great aims and ends of education. Nor are we

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[4] The tax exemption clause of the Georgia Constitution uses the term "public charity" whereas the federal tax statutes refer merely to "charitable" contributions, gifts, bequests, etc. However, in legal terminology "charity" and "public charity" mean the same thing. The word "benevolent" may include private benefactions beyond the accepted scope of charity or public charity, whereas charity as a legal term excludes and distinguishes private benefactions. See *St. Louis Union Trust Co. v. Burnet*, 59 F. 2d 922. (8th Cir. 1932.)

[5] Webster's New International Dictionary, Second Edition, at page 453 under the topic "charity" speaks of:

> "An eleemosynary gift; a gift, as by grant or devise, of real or personal property to the use of the public or any portion of it (as distinct from specific individuals) for any beneficial or salutary purpose . . ."

at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us. The question, what is the public policy of a state, and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions and upon which men may and will complexionally differ . . ." (2 How. 198-199).

II. The Georgia Courts Were Right in Not Applying Cy Pres as Requested by Petitioners.

In the footnote on page 29 of their brief, counsel for the United States indicate that while they consider that Baconsfield may not be operated exclusively for white persons, they think it would be "premature" for this Court to consider whether the present trustees may close the park, or whether the heirs of Senator Bacon may obtain the property by reversion and use it for non-park purposes. We are entirely in accord with that statement, especially since the Georgia Supreme Court has not addressed itself to either question. As already noted the Georgia Supreme Court has not even expressed itself on whether the present Board of Managers may operate Baconsfield in accordance with the will with private trustees holding the legal title. Further, it is not certain whether either or both of those possibilities would ever be raised even if this Court should rule that Baconsfield may not be operated in accordance with the will. Nor do we see how either possibility could raise a federal question.

However, petitioners seem to go beyond the question of whether or not Baconsfield may be operated in accordance with the will, since they argue that the Superior Court

should have treated the racial limitation as being utterly void and have granted them relief which would insure the future of Baconsfield as a park open to all races. At page 15 of their brief they speak of treating the racial limitation as "pro non scripto", and they argue that it should be disregarded, and that the City should have been compelled to remain as trustee. Thus in effect they are saying that the trust should have been declared unenforceable as written, and the cy pres doctrine should have been applied to insure the future of Baconsfield as a park open to all races.

However, there is no merit in the contention of petitioners made at page 21 of their brief that the racial clauses should be disregarded as blatantly violating the Fourteenth Amendment. Even in **Shelley v. Kraemer**, 334 U. S. 1, where state courts were precluded from enforcing a racial clause in a deed because that action would have denied the rights of a Negro to buy property from a willing seller, a right guaranteed by the Civil Rights Acts of 1866 and 1870, this Court said:

> "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." (334 U. S. 13.)

In order to "desegregate" Baconsfield petitioners must not only have a ruling by this Court that the park may not be operated in accordance with the will, but they must also have a ruling from the Georgia courts that as a matter of Georgia property law cy pres can be applied to Baconsfield, and that it may be applied in such a way that the property would continue as a park but with the racial

limitation eliminated. Petitioners did request the Superior Court of Bibb County to apply cy pres in a manner which would eliminate the racial limitation (R. 41), and they did contend in their Bill of Exceptions in the Supreme Court of Georgia that this should have been done (R. 2). However, there is no merit in their complaint made in this Court that the Georgia courts acted wrongly in not making that application of cy pres.

Of course, under the law of Georgia as well as that of all other states, the question of whether or not the doctrine of cy pres can be applied arises only when it is shown that a charitable trust is not capable of execution in the exact manner provided by the settlor. The Supreme Court of Georgia did not reach that conclusion (R. 87). Hence it quite properly declined to consider petitioners' position on cy pres. That Court further noted (R. 87) that it was doubtful whether those who are petitioners here could, as intervenors in the Superior Court of Bibb County, raise the question as to the appropriateness of applying cy pres.

Moreover, there are additional complications in relation to any attempt to apply cy pres in the manner outlined by petitioners. That doctrine as understood in this country is an intent enforcing doctrine. Closely allied to that idea is the further notion embodied in the jurisprudence of all the states that cy pres can be applied only where there is expressed a general charitable intent.

Georgia Code, Section 113-815, reads as follows:

> "Charitable devise or bequest. Cy pres doctrine, application of.—A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by ap-

proximation, effectuate the purpose in a manner most similar to that indicated by the testator."

In most of the cases that have arisen in Georgia and elsewhere where some portion of a testator's purpose has been frustrated, what has become impossible of accomplishment is not an essential element of the trust but only a mode of fulfilling some more general purpose of the settlor. Thus the doctrine cy pres is applied to accomplish the general purpose by a different mode than was prescribed. However, where a settlor prescribes a plan for benefiting a limited part of the public in a very particular way by a detailed plan which he outlines, and expresses no desire to benefit mankind in some more general way, then no general charitable intent is manifested, and cy pres is inapplicable. **Adams v. Bass**, 18 Ga. 130 (1855): **City of Danville, Ky. v. Louise Caldwell**, 311 S. W. 2d 561 (1958); **Industrial National Bank v. Isabel Drysdale et al.**, 114 A. 2d 191 (1955); **First Universalist Society of Bath v. Swett et al.**, 148 Me. 142, 90 A. 2d 812 (1952); **Teele v. Bishop of Derry et al.**, 168 Mass. 341, 47 N. E. 422 (1930); **Shannep v. Strong**, 160 Kan. 206, 160 P. 2d 683 (1945); **Women's Christian Temperance Union of El Paso et al. v. Cooley**, 25 S. W. 2d 171 (1930); **Murr v. Youse**, 52 Abs. 321, 80 N. E. 2d 788 (1946), and **Hampton et al. v. O'Rear et al.**, 309 Ky. 1, 215 S. W. 2d 539 (1948).

This Court in reviewing a case from the Supreme Court of the District of Columbia enunciated these same principles in **Hopkins v. Grimshaw**, 165 U. S. 353 (1897):

> "A grant for the maintenance of a churchyard or burial ground in connection with a church or religious society, or of a public burial ground, or a burial ground of all persons of a certain race, class, or neighborhood, might be considered as in the nature of a dedication for a pious and charitable use . . . If it be assumed, however, as most favorable to the defendant,

that this deed created a charitable trust, it was not a grant indicating a general charitable purpose, and pointing out the mode of carrying that purpose into effect; thus coming within the class of cases in which courts of chancery, when the particular mode had failed, have carried out the general purpose . . . But the trust was restricted, in plain and unequivocal terms, to the particular society to be benefited, as well as to the purpose of a burial ground; adding (as if to put the matter beyond doubt) 'and for no other purpose whatever.' The trust would end, therefore, at the latest, when the land ceased to be used as a burial ground, and the society was dissolved . . ."

Beyond Bacon's very specific, detailed plan for a park for "the white women, white girls, white boys and white children of the City of Macon" (R. 19), his will evidences no more general plan to benefit mankind. He provides for a park for that limited class and then states:

". . . the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized . . ." (R. 19).

However, even if at some future time the question of whether or not to apply cy pres should arise, and even if the Georgia courts should find a general charitable intent expressed and apply cy pres, it is possible that Bacon's property would cease to be used as a park but would be sold and the fund used for some other charitable purpose. A "desegregated" park might well not be found to be the nearest approximation of his intent in view of his express disapproval of recreational grounds to be used by both races together (R. 21).

While no Georgia case has ever decided whether a racial limitation in a gift of a park in trust to a city

as trustee for the persons of one race was in the settlor's mind an essential and indispensable part of the trust plan, the Supreme Court of Michigan held that an unambiguous racial limitation in a gift to a City of property for a "playfield" for white children might not be eradicated through the application of cy pres. This result obtained in **La Fond v. City of Detroit,** 357 Mich. 362, 98 N. W. 2d 530 (1959), though the testatrix there placed far less emphasis on the racial restriction than did Mr. Bacon.

It would appear that the "desegregation" of Baconsfield could never be accomplished by applying any concept of cy pres as understood in the law of any state in this country. Indeed, the result desired by petitioners could be obtained only by returning to our jurisprudence the rightfully despised doctrine of the royal prerogative. That doctrine is described in **4 Scott, Trusts,** page 2829, Section 399.1 (2d ed. 1956):

> "The exercise of the prerogative power by a biased or cynical or whimsical king sometimes resulted in devoting the property of the testator to purposes of which he never would have approved, purposes which might run entirely counter to his wishes . . ."

However, it is well established by **Jones v. Habersham,** 107 U. S. 174, that the royal prerogative or sign manual is not part of the jurisprudence of Georgia:

> ". . . the law of charities is fully adopted in Georgia, as far as is compatible with a free government where no royal prerogative is exercised . . ."

Scholars who wish to point out the obvious evils of the doctrine of the royal prerogative cite as the classic case of injustice, **Da Costa v. De Pas,** 1 Amb. 228, 2 Swanst. 487 (1754), where under the sign manual prop-

erty of a Jewish testator left in trust to establish an assembly for reading Jewish law was diverted by the authority of the Crown to the advancement of the Christian religion.

Bacon's great emphasis on his racial limitation and his express disapproval of recreational areas to be used by the members of both races together and in common show that a "desegregated" park area would indeed be as contrary to his wishes as the final disposition in **Da Costa v. De Pas** would have been to the testator in that case:

> "I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common . . ." (R. 21).

III. The Trusteeship of the City, Unlike the Racial Limitation, Was Not Essential in the Mind of Mr. Bacon.

At page 20 of their brief petitioners say that Bacon expressed a choice for a racial limitation and also a choice for the City of Macon to serve as trustee and did not say which of these he would choose to retain and which to lose, if he could not have both. From this they reason that in the resignation of the City of Macon the City and the Georgia courts made a choice for Mr. Bacon without any guidelines from the testator, and that it is these state agencies, therefore, which must be credited with the choice in favor of the racial clauses.

But this contention is absolutely devoid of merit. The guidelines are there, and the choice was that of Senator Bacon. Normal rules of testamentary construction show that he placed greater emphasis on his class of beneficiaries than on the identity of his trustee or trustees.

He creates a park for the sole use (R. 19) of "white women, white girls, white boys and white children" and in the same sentence provides that the property is at no time for any reason to be devoted to any other purpose or use except as specifically authorized. Thus he says that his property shall be put to no other use, but by contrast he nowhere says that it shall under no circumstances have a different trustee. Nor is there anything in his trust purpose that requires a municipal trustee. Indeed, he minimizes the role of the City by providing for the Board of Managers which shall at all times have (R. 19) "complete and unrestricted control and management" of the property. Thus the City is no more than a passive title holder, while the Board of Managers composed of private citizens operates Baconsfield.

Further, the Senator expressly disapproves of recreational grounds to be used in common by the white and negro races (R. 21). He does not, however, expressly or impliedly disapprove of charitable trusts with private trustees.

Certain passages of the will make it clear that the trusteeship of the City, unlike the racial limitation, was not an essential and indispensable part of the trust plan. He expresses doubt as to whether or not the City of Macon has the charter power to act as trustee (R. 24) of his trust but he goes ahead with it, nevertheless, and provides for the contingency of the City's being unable to serve (R. 24). He also makes reference (R. 19) to the Mayor and Council of the City of Macon or "their successors in said trust."

We submit the conclusion is inescapable that Bacon would have preferred to lose the passive trusteeship of the City than the racial limitation. The question is, of course, the relative importance of these two matters in

the mind of the testator and not in the mind of someone else or in the minds of this Court.[6]

Nor do petitioners correctly construe the provisions of the will which they quote at page 17 of their brief. Those provisions against a sale or disposal of the property do not preclude a change in trustee but are obviously intended only to forbid the City or any successor trustee or trustees from diverting the property to some other use than that specifically authorized, i. e., from treating the property as though it were owned in fee simple absolute. The rest of that sentence reads, "or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized" (R. 19).

IV. The Acceptance of the City's Resignation as Trustee Was Necessary and Proper.

Petitioners make further argument that the trusteeship of the City of Macon has by some process of administrative osmosis bestowed on Baconsfield such a public char-

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[6] It is significant that the Pennsylvania courts in the *Second Girard College Case*, i. e., *In Re Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844 (1958), appeal dismissed and certiorari denied, 357 U. S. 570, following normal rules of testamentary construction found the racial clause in the will of Stephen Girard more essential than the trusteeship of the Board of City Trusts which had taken over the trust from the City of Philadelphia named by Girard as trustee. It is obvious that the Girard will places far less emphasis on the racial limitation and far more emphasis on a governmental trustee than does the Bacon will.

As to Girard's emphasis on his desire for a governmental trustee Justice Musmanno dissenting *In Re Girard's Estate*, 127 A. 2d 287, at 330 said:

> ". . . Girard was so determined that the whole project be governmental that he directed that if the City of Philadelphia failed to carry out his instructions, the Commonwealth of Pennsylvania would become the successor in title, and if the Commonwealth was also indifferent to its obligations under the will, the estate would then become the property of the United States of America. What more could a person do to demonstrate the undeviating public character of the trust?"

acter that it must now be viewed as subject to the Fourteenth Amendment. And presumably they argue that being subject to the Amendment, the trust must have a municipal corporation as trustee, and that therefore the Superior Court of Bibb County might not accept the City's resignation.

We know of no case where the character or nature of a trustee eroded away an essential element of a trust's purpose. A trust does not become molded in the image of the trustee, but rather if a trustee because of its nature becomes incapable of carrying out the trust, this calls **not** for a modification of the trust but for a change in trustee. This principle applies where the trustee is a municipal corporation. In **Vidal et al. v. Girard's Executors**, 2 How. 127, it was argued that changes in the nature of the corporate entity of the City of Philadelphia made the Girard trust unenforceable since the City could no longer act as trustee. To this argument this Court said:

> ". . . It is true that, if the trust be repugnant to or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust . . ." (2 How. 188).

Nor can it matter so far as the enforceability of the trust is concerned that the City of Macon continued to serve as trustee for several years after this Court's decision in the **First Girard College Case**, i. e., **Commonwealth of Pennsylvania v. Board of Directors of City Trusts**, 353 U. S. 230. How can a trustee affect the validity of a trust

by a negligent failure to react to constitutional developments? If a trustee could so affect a trust, it might well react slowly by design and thereby expand a class of beneficiaries.

It was quite proper for the Mayor and Council of the City of Macon to resign as the trustee of Baconsfield. Indeed the **First Girard College Case** requires that Baconsfield have a new trustee since under that decision property may not be operated for the sole benefit of one race where there is a governmental trustee. Of course, nothing about this Court's decision in that case, i. e., in the **First Girard College Case**, where a governmental body served as trustee of a trust for poor male white orphans, precluded a change in trustee.

In fact, after this Court's decision the Orphans' Court of Philadelphia removed the governmental trustee, the Supreme Court of Pennsylvania affirmed this action in **In Re: Girard College Trusteeship**, 391 Pa. 434, 138 A. 2d 844 (1958), and this Court dismissed an appeal and denied certiorari, 357 U. S. 570.

Nevertheless, petitioners argue that the City might not resign as trustee of Baconsfield. Presumably they hope to "desegregate" Baconsfield by the unusual procedure of freezing the City to its post as trustee and then relying on the principle in the **First Girard College Case**. Thus, while not carrying the burden of showing how petitioners could possibly have acquired an interest in Senator Bacon's gift, they will be able to say that negro citizens have gained "rights" by indirection, since the true beneficiaries will be powerless to assert their right to that undiminished use of the limited facilities of Baconsfield to which they are entitled under the will.

It is claimed that the City had to resist its removal though the continued execution of the trust it had sworn

to uphold was thwarted by its continued service. In substance, then, petitioners go beyond arguing that the State may not discriminate and say that the State must help to expand or preserve the areas of its presence to help some of its citizens muster and support arguments for state involvement against others in situations which are not peculiarly the subject matter of state responsibility. Such is not the law.

It is true that the State may not discriminate, but the Fourteenth Amendment does not require that the State or its agencies prevent discrimination by private individuals. The class of beneficiaries of this trust was chosen by Bacon and not by the City or the Superior Court or any other governmental agency. If Bacon's choice be deemed that of the State because the State did not prevent his making it or render it ineffective after his death, then this Court's decision in the **Civil Rights Cases**, 109 U. S. 3, is meaningless.

Further, even if the cy pres power could be appropriately applied to eliminate the racial limitation, this would be the function of a court and not of the Mayor and Council.

V. Shelley v. Kraemer Does not Support the Position of Petitioners.

Petitioners say **Shelley v. Kraemer**, 334 U. S. 1, required Bibb Superior Court to refuse to allow the City to resign as trustee. This reliance is misplaced. Nor would that case have precluded the Superior Court from removing the City as trustee.

It is true that the action of a state court is state action. That is well settled. The fallacy in the argument of petitioners is that this action of Bibb Superior Court did not deny them any right to which they are entitled. One

must have a right before one may have it denied. The Fourteenth Amendment created no new rights in one citizen against another. **United States v. Cruikshank,** 92 U. S. 542, 554; **United States v. Harris,** 106 U. S. 629, 638; **James v. Bowman,** 190 U. S. 127, 136; **Collins v. Hardyman,** 341 U. S. 651, 658. And no person has any "right" to participate as a beneficiary of a charitable trust where he is not within the class named by the settlor to enjoy the fruits of his bounty. A fortiori he has no right to contest the resignation of a trustee.

In **Shelley v. Kraemer** there was involved the right of a Negro citizen to buy property which the owner desired to sell him, a right guaranteed by the Civil Rights Acts of 1866 and 1870.

Reliance on the Civil Rights Acts is apparent from the opinion in **Shelley:**

> "Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution **and Acts of Congress passed pursuant to that Amendment** . . ." (334 U. S. 7). (Emphasis supplied.)

The Civil Rights Act of 1866, now 42 U. S. C., Section 1982, which was reenacted in Section 18 of the Act of May 31, 1870, provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

As recently as Mr. Justice Black's opinion in **Bell v. Maryland,** 378 U. S. 226, it was recognized that:

". . . Nearly all the briefs in **Shelley** which asked invalidation of the restrictive covenants iterated and reiterated that judicial enforcement of this system of covenants was forbidden state action because the right of a citizen to own, use, enjoy, occupy and dispose of property is a federal right protected by the Civil Rights Acts of 1866 and 1870, validly passed pursuant to congressional power authorized by Section 5 of the Fourteenth Amendment . . ." (378 U. S. 329).

Thus we see that what **Shelley** condemns is not that a state court merely denies a claim by persons who make it as members of a particular racial or religious group. Rather what is forbidden is for a state court to take an action on the basis of race or some purely arbitrary classification which denies persons rights to which they are entitled. The contention of petitioners that they have acquired "rights" to participate in Bacon's trust because the Superior Court of Bibb County did not command the City of Macon to serve as trustee amounts to no more than a bald assertion that one may create rights by asserting them in a state court and having them denied. Or stated differently, their position is that when persons make claims in a state court as members of a particular race, they must win or the Constitution is violated.

To the extent that **Shelley v. Kraemer,** 334 U. S. 1, is involved here it hurts petitioners rather than helping them. It must be remembered that the doctrine of **Shelley** protects the rights of all persons. In **Bell v. State of Maryland,** 378 U. S. 226, where this Court split three ways, Mr. Justice Black stated in a dissenting opinion in which Mr. Justice Harlan and Mr. Justice White concurred:

". . . But petitioners here would have us hold that, despite the absence of any valid statute restricting the use of his property, the owner of Hooper's Restaurant in Baltimore must not be accorded the same

federally guaranteed right to occupy, enjoy, and use property given to the parties in **Buchanan** and **Shelley**; instead, petitioners would have us say that Hooper's federal right must be cut down and he must be compelled—though no statute said he must—to allow people to force their way into his restaurant and remain there over his protest. We cannot subscribe to such a mutilating one-sided interpretation of federal guarantees the very heart of which is equal treatment under law to all. We must never forget that the Fourteenth Amendment protects 'life, liberty, or property' of all people generally, not just some people's 'life,' some people's 'liberty,' and some kinds of 'property.' " (378 U. S. 331-332.)

Nothing in the record suggests that Baconsfield affords sufficient space to accommodate all the people of Macon. Such could hardly be imagined to be the case. Thus, it follows that any right created in negro citizens of Macon to use this land must impair to some extent the use of this land by the "white women, white girls, white boys and white children of the City of Macon". These last named persons are the only persons having rights in Bacon's gift (R. 19) which require protection. For the Court to have required the City to serve as trustee would have been state action denying to those named beneficiaries solely because of their race the right to enjoy unimpaired the full benefits of Bacon's gift unshared by others in the same way that any class of beneficiaries enjoys the bounty of its settlor. Surely such action would have violated the rule in **Shelley v. Kraemer**, 334 U. S. 1.

VI. Georgia Code, Sections 69-504, 2-5404 and 92-201 Are Not Significant Considerations.

The attempt of petitioners to have Georgia Code, Section 69-504 (Acts 1905, p. 117), viewed as playing a significant

part in the creation of Senator Bacon's racial limitation will not bear analysis.

In 1904, the year prior to the passage of that statute, a testator in Georgia could obviously have created a trust involving a park with a municipal corporation as trustee without inserting any racial restriction. Or he could have created such a trust with a racial restriction. In both connections we point out first that while no Georgia case had dealt with a charity involving a park, such trusts had been recognized in other states. **In Re Smith Estate**, 37 A. 114 (1897). Indeed, petitioners concede that parks were properly the subject matter of charitable trusts at common law and cite several cases on that point at page 12 of their brief. Secondly, Georgia Code, Section 69-502 (Acts 1892, page 104), provided:

> "May act as trustees—The incorporated towns and cities may act as trustees under any conveyance or will donating or giving property for charitable or eleemosynary purposes."

Thus we see that unless Section 69-504 destroyed the previously existing right of Bacon to establish a park for both races, he was free to make his own choice as to the recipients of his gift.

And as the Supreme Court of Georgia noted in its opinion (R. 86):

> "The law of charities is fully adopted in Georgia . . . **Jones v. Habersham**, 107 U. S. 174 (5), (2 S. C. 336, 27 L. E. 401). Under the law of this State any person may, by will, grant, gift, deed, or other instrument, give or devise property for any charitable purpose . . . The contention by counsel for the plaintiffs in error that Code Section 69-504 required A. O. Bacon to limit the use of Baconsfield to the members of one race can not be sustained. Code Section 69-504,

in providing for gifts limited to members of a race, simply states that any person **may** 'devise, give, etc.' The law of Georgia does not by Code Section 69-504, nor by any other statutory provision, require that any testator shall limit his beneficence to any particular race, class, color, or creed . . ." (Emphasis is that of the Georgia Supreme Court.)

Petitioners argue, however, that Bacon had no such construction of the statute before him in 1911, and that he may have been in doubt as to whether or not it did not **require** racial separation. But this statute is not confusing or bewildering in the least. Why would Bacon interpret the word "may" as being mandatory?

The weakness of petitioners' position becomes the more apparent, when we realize that the State of Georgia at no time required the maintenance of separate state or city owned parks for the two races. Such parks were always open to both races. Of course, Code Section 69-504, the only Georgia Code Section involving parks which mentions race, does not deal with state owned parks at all, and while it deals with city owned parks acquired by a private gift as well as with gifts in trust, it does not deal with the vast majority of city parks which are established by other means. The statement at page 23 of petitioners' brief to the effect that Georgia has or had a policy of excluding one race or the other from all public parks is a gross inaccuracy. Nor could Georgia Code Section 69-504 possibly be viewed as "an awesome portent that Georgia would not tolerate unsegregated parks" as suggested at page 11 of the brief of petitioners. On the contrary Georgia's parks have never been restricted as to race.

Nor, we might mention, has the City of Macon ever had any municipal ordinance requiring separate parks for the white and negro races.

Why should Senator Bacon have placed an unnatural, mandatory construction on Section 69-504 and read it as a state requirement that parks set up as private trusts must be limited to one race when the state's own parks were not so limited?

Petitioners assert further that even if the statute did not raise doubts in Bacon's mind as to whether or not it might be mandatory, it is still significant because it made a change in the common law by elevating parks for one race to the position of a charity. There have been only a few cases dealing with charities involving parks and only a few more cases involving charities limited as to race. Thus, whatever significance may be attributed to the point, it is not surprising that there may not be any cases expressly recognizing as charitable a park for one race. There is no logical reason, however, to suppose that such a charity would not have been recognized at common law if the occasion had arisen. **4 Scott, Trusts**, page 2715, Section 375.2 (2d ed. 1956), cited by petitioners, does not support petitioners' contention based on it that only trusts for educational or religious purposes or for aid of the poor could be limited to a restricted class:

> "But a trust unconnected with the relief of poverty or the advancement of education or religion or health in order to be charitable must be for the benefit of a larger class than need be benefited if the trust is connected with such purposes . . ."

But, of course, Bacon's class of beneficiaries is a very large one.

Petitioners argue at page 7 of their brief that his preference for a racial limitation "if any" must be disregarded.

First we note that their expression of doubt about his desire to limit his park to white persons is startling in the

extreme. Bacon spoke of Baconsfield as being for the use, benefit and enjoyment of "the white women, white girls, white boys, and white children of the City of Macon" (R. 19). For the control, management, preservation and improvement of the property he created a Board of Managers "consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons" (R. 19). The Board of Managers should have the power to admit "the white men of the City of Macon, and white persons of other communities" (R. 20). He further states (R. 21):

> "I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common . . ." (R. 21).

Finally, after noting (R. 21) that Baconsfield shall be a memorial to his deceased sons, he says (R. 24):

> ". . . As there will be no one of my descendants who now bears my name either by right or birth, or through voluntary choice, an additional reason is furnished why I should deem it proper that in devoting this property to the uses specified, I should at the same time link their memories with the pleasures and enjoyments of the women and children and girls and boys of their own race in the community of which they once formed a happy part."

But petitioners say his intent must be disregarded, however plain it may be that he acted quite independently of Georgia Code, Section 69-504.[7] However, as already noted,

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[7] Over and over petitioners argue that though Senator Bacon gave personal reasons for his decision to benefit only white persons, that still he must have known about Georgia Code, Sections 69-504 and 69-505, and somehow that must be significant. But see again the passages of the will (R. 24) where he provides

the law of Georgia did not require a testator to limit his bounty to the members of one race, nor did it place any burden on one who desired to create a park for all races. Trusts for one race have always been recognized in the case law of the states. Why should Bacon be denied the right to create such a trust just because the authorization to create such trusts in Georgia also existed in Code form.

At page 28 of their brief, petitioners assert that since 1918 Georgia has conditioned tax exemptions on the maintenance of racial restrictions in the operation of charitable trusts, quoting in part from Georgia Code, Sections 2-5404 and 92-201 mentioned there and set out in full at pages 3 and 4 of their petition for certiorari. This is a rather extreme exercise of literary license. The actual language from which the conclusion is drawn follows language exempting from taxation properties of "all institutions of purely public charity", as well as other specified properties, including (1) all public property, (2) places of religious worship or burial, (3) intangible personal property owned by or irrevocably held in trust for the ex-

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that if it be held that the City of Macon has not the legal power under its charter to hold his property in trust for "the purposes specified", appropriate legislation be obtained to bestow that power upon the City. But Georgia Code, Sections 69-504 and 69-505 set out at page 3 of petitioners' brief expressly recognized the power of any municipality in Georgia to serve as trustee for such purposes. It is obvious that Bacon didn't know of those two sections when he drafted the passages above mentioned, and it is very reasonable to conclude that those passages were lifted from an earlier draft of his will completed before the passage of those two companion sections. Thus any similarity between the wording of his will and that of the statute most probably demonstrates that the statutes were patterned to fit his will rather than the other way around. His concern about the extent of municipal power to act as trustee undoubtedly reflected a degree of uncertainty in his mind as to whether the City could serve as trustee for only a part of its citizens. Thus we see either that the racial limitation was in his mind before 1905 when the two Code Sections were enacted, or that, if the passages were written after their enactment, the Senator was not familiar with them.

clusive benefit of religious, educational and charitable institutions, and (4) buildings erected for and used as a college, non-profit hospital, incorporated academy or other seminary of learning, including funds or property held or used as endowment by such colleges, non-profit hospitals, incorporated academies or seminaries of learning, provided the same is not invested in real estate; to which is added: "provided, further, that all endowments to institutions established for white people, shall be limited to white people, and all endowments to institutions established for colored people shall be limited to colored people."

This proviso was added by amendment in 1918 to the Constitution of 1877 and was brought forward into the Constitution of 1945. To the extent that it has any meaning it seems to limit the use of **endowments** of existing institutions, but it has never been applied or enforced in Georgia or interpreted by the courts of Georgia except as it came before the Supreme Court of Georgia in 1962 in the case of **Emory University v. Nash**, 218 Ga. 317, 127 S. E. 2d 798 (1962), on the petition of Emory University for a declaratory judgment. In that case the Georgia Supreme Court said that the proviso quoted above was so inconsistent with a preceding proviso relating to colleges, non-profit hospitals, incorporated academies or other seminaries of learning as to be irreconcilable and that the two irreconcilable provisos completely neutralize and destroy each other. In a special opinion Presiding Justice Head concurred on the ground that the proviso was so vague and uncertain as to totally defeat the purported limitation. More specifically, Justice Head said:

> ". . . The third proviso (quoted above) being incapable of any legal construction as applicable to the exemption from taxation, and being otherwise in conflict with the body of the act, if construed as

limiting the exemption granted, the proviso must fall, and the body of the act must prevail . . ." (127 S. E. 2d 803).

We confess with Justice Head that we do not know what the proviso meant, or means, but at most it appears to proscribe a misapplication of endowment funds rather than racial segregation or desegregation. It certainly does not justify the statement in petitioners' brief that Georgia has conditioned tax exemption on the maintenance of racial restrictions in the operation of charitable trusts.

Since Bacon wrote his will in 1911 and died in 1914, and the proviso in the Constitution and statutes pursuant thereto making reference to race were enacted subsequently in 1918, they apparently are not cited for any influence they may have exerted upon him. Even if the provisos have the construction placed upon them by petitioners they would simply be a nullity. Further, since a state may not alter a trust by deliberate legislation aimed at such a result, **Trustees of Dartmouth College v. Woodward**, 4 Wheat. 518, Georgia certainly could not affect the validity of Bacon's trust indirectly by the passage of a tax exemption statute after his death having the construction which petitioners place upon this one.

We have no construction of these statutes by the Georgia courts in this case, since petitioners mentioned them for the first time in their petition for certiorari.

All in all, our reaction to this case is much like that expressed by the Supreme Court of Pennsylvania in the **Second Girard College Case**, i. e., **In Re Girard College Trusteeship**, 391 Pa. 434, 138 A. 2d 844, appeal dismissed and certiorari denied 357 U. S. 570, when it said:

"The appellants' effort to make a 'segregation' issue out of Stephen Girard's private charity, merely

because of the inability of the Board of City Trusts, as trustee, to comply with the donor's express directions, serves only to confuse and obscure the real issue involved as to the right of a private individual to bequeath his property for a lawful charitable use and have his testamentary disposition judicially respected and enforced." (138 A. 2d 847.)

CONCLUSION.

The judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 61

E. S. EVANS, *et al.*,

Petitioners,

v.

CHARLES E. NEWTON, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I.

General Reply.

Respondents' brief addresses itself to a number of special points in petitioners' argument (and in that of the United States as *amicus curiae*). It is petitioners' belief that these special arguments can best be replied to within a framework which exhibits the relevance (or lack thereof) of the issues to which respondents address themselves. With deference, it seems to petitioners that the tendency of respondents' brief is to confuse; the most effective reply is a clearer structuring of the issues.

The following are the affirmative parts of the decree of the Superior Court: (1) The acceptance of the City's resignation as trustee, (2) The appointment of new trustees. It is against the affirmance of this judicial decree that petitioners complain to this Court. Primarily, what petitioners

ask of this Court is a reversal, and a remand with directions to vacate that decree and undo its effect.

The Superior Court entered this decree in a suit brought by persons appointed by a public authority, with the announced sole purpose of bringing about the reinstitution of racial discrimination in Baconsfield. The resignation accepted was tendered by a public authority on the assigned sole ground that its tendering and acceptance would make possible such reinstitution of racial discrimination. The new trustees, under these circumstances, were appointed in order that they might discriminate. It is petitioners' contention that the Superior Court's action in accepting the resignation, and in appointing new trustees, given the nature of the parties and the state of the pleadings before it, constituted the last and crucial step in a set of actions violative of the Fourteenth Amendment.

Petitioners contend that the Superior Court's action was violative of the Fourteenth Amendment, and must be reversed and undone, on *either* of two hypotheses, which exhaust possibility:

> (1) The Superior Court's action was violative of the Fourteenth Amendment, if it be assumed that the new trustees, if confirmed in office, might constitutionally discriminate. On that view (which petitioners think the wrong view) the actions of the Board of Managers and of the City, and the action of the Superior Court confirming the steps they had taken, are unconstitutional on the ground that it is not the proper business of any public authority to act affirmatively to clear the way for racial discrimination, even though that discrimination will have become lawful in itself in con-

sequence of the accommodating governmental action. Here, of course, one parallel will be *Shelley* v. *Kraemer*, discussed at length by respondents, but this is so much stronger a case than *Shelley* that none of the perplexities surrounding that case in many minds should impede decision in this case. Here the intervention of public authority—Board of Managers, City, and a Court of Equity supervising a charitable trust—is several orders of magnitude higher than in *Shelley*. And here, in contradistinction to the lower court's action in *Shelley*, the public power is not carrying out an unequivocally expressed private choice, but is itself inescapably choosing between two equally clear instructions of the testator, incompatible as a matter of law.

(2) The Superior Court's action was violative of the Fourteenth Amendment if the resegregation of Baconsfield by the new trustees would itself violate the Fourteenth Amendment, because on that hypothesis the action of the Board of Managers, the City and the Court was directed at the institution of a discrimination forbidden by the Constitution. It would not matter that a new lawsuit might after a lapse of time correct the discrimination. The Constitution forbids racial discrimination for a day or a year as well as for a century. If it will be unconstitutional for the new trustees to segregate, then it was unconstitutional for the Superior Court to put them in office for that unlawful purpose, after a resignation, tendered by a City, for the same announced unlawful purpose.

It is to be the establishment of the second of these alternative grounds that the establishment of the illegality of

discriminatory operation of Baconsfield, by the new trustees, is essential. (The unlawfulness of such operation with the city as trustee is conceded by itself.) Petitioners, replying to respondents' arguments, will contend that such operation would be unlawful:

(1) Because the state power, favoring charitable trusts and policing compliance with their terms, would be involved in a manner forbidden by the doctrine of *Shelley* v. *Kraemer*.

(2) Because, against the background of Georgia law prior thereto, §69-504 of the Georgia Code must be taken to have constituted a form of state influence surrounding the creation of trusts; indeed, that section, against such background, seems to have made flatly unlawful the *unsegregated* limitation—"*all* women and children"—exactly corresponding to the segregated one Senator Bacon used—"*white* women and children."

(3) Because the public character of Baconsfield—not necessarily as a charitable trust in general, but as a charitable trust that can be held to be such *only* because of its wholly public purpose and, indeed, its taking over of a governmental function—invests it with governmental character.

(4) Because, beginning with its necessary *affirmative approval* of the conditions in Senator Bacon's will (Georgia Code 69-501, Acts, Ga. 1892, p. 104), the past involvements of the City with Baconsfield are such as to make it impossible for a formal transfer to eradicate the factor of state involvement in its operation.

Petitioners, then, contend that the decree entered below violated the Fourteenth Amendment on *either* of the two

possible views. It was either (1) the last and confirming step in a series of actions, themselves taken by public authority, by which a racial discrimination previously unlawful was purposefully made lawful, or (2) the last and confirming step (as petitioners urge is the correct view) in a series of such actions, by which an unlawful racial discrimination was made factually possible, at least for a time. On either view, reversal is required, and the apt remedy is a mandate requiring rejection of the City's resignation and rescission of the appointment of new trustees. While petitioners will reply one by one to such of respondents' points as require it, each such reply should be read with the above outline in mind.

II.

Certain Particular Errors in Preliminary Parts of Respondents' Brief.

A. *"The Board of Managers of Baconsfield."*

Under the quoted heading, at p. 12 ff., respondents contend that the Board of Managers of Baconsfield is not an organ of public power in any sense. "The Board is not the agent of the City but of Mr. Bacon." p. 12. This contention is made in the face of the fact that the Board is appointed by the City Council, to supervise a park of which the City is trustee. That Georgia law and equity give such trustee no power over such a Board is hard to believe. See, Bogert, Trusts and Trustees, §391, at pp. 205-6 (1960). But in any event the Board was, at the crucial time of the inception of this lawsuit, and until appeal was taken from the lower court's decree, constituted, as to personnel, by the City Council. It was, moreover, all white (a thing

which can hardly be held immaterial to its deciding to start this suit) because the City Council, a purely public authority, obeyed a private man's wish by making all white appointments, thus discriminating racially.

The petition in the court below seems in itself to recognize the City's ascendancy over the Board, at least in part, for it confesses the Board's inability to control the park's use, while at the same time saying that a new trustee, in the City's place, would have powers the Board does not have. If the Board is independent of the City, why could it not have done what the new trustee could do?

But if the respondents were to succeed in establishing their thesis that the Board was in complete charge, independently of the City, they would have won a Pyrrhic victory. They rightly see that this thesis requires that the City be viewed as a "passive title holder," a characterization said by respondents to be of "vital significance." (Respondent's Brief, p. 12) But if that really were all the City was, then its "resignation" was a sham, a "resignation" from nothing, a "resignation" which could have had no reason, and can bear no significance, except clearing the road for the continuing all-white character of Baconsfield. If respondents are right, the City had no duties to resign from, and resigned away only the claims of its colored citizens. None of the substantial reasons for allowing trustees' resignations would apply (see Bogert, Trusts and Trustees, §515 (1960)), and to "freeze" the City as trustee (see Respondents' Brief, p. 43) would "freeze" it in nothing, but would, on a practical analysis, be no more than requiring it not to act affirmatively as an accessory before the fact to racial discrimination, while at the same time very substantially breaking its trust, as a City, to all its citizens.

Finally, the involvements of the City, in tendering its "resignation" and in other manners, are so deep, that the public power is vitally engaged, whatever view be taken of the status of the Board of Managers.

B. *"The Scope of the Georgia Supreme Court's Decisions."*

In the section so headed, respondents appear to be contending that no issue of federal law was raised before or decided by the Georgia Supreme Court. This thesis is one petitioners confess difficulty in understanding. Petitioners' amended petition for intervention, in the Superior Court, objected on federal constitutional grounds to the exact action the court later took (R. 63). The repugnancy of this action to the Fourteenth Amendment was assigned as error to the Georgia Supreme Court (R. 2). As stated and in substance, this was a federal question, the question whether the resignation could be approved, and new trustees substituted, all for the overtly proclaimed purpose of re-segregating Baconsfield, without violation of the Fourteenth Amendment. No legerdemain, no prestidigitation with state code provisions, can make that question anything but federal.

It is true that, when the order was entered in the Superior Court, segregation had not yet recommenced. But it had been announced repeatedly, on the sheer common-law record, that the purpose of the whole proceeding was resegregation, that that and only that was what the order was in aid of, and that the business would be getting under way as soon as practicable after the order was signed. Whether the judicial act performed in that context and with that effect was in violation of the Fourteenth Amendment is the central federal question in this case. That it

has clear logical connections with the further federal question—whether the racialist operation of the park by "private" trustees also violates the Fourteenth Amendment, does not make it any the less a question in itself, or any the less "federal".

III.

The Respondents Are Mistaken in Maintaining "the Private Nature of Charitable Trusts" (Brief p. 23) and in Their Deductions Therefrom.

Perhaps seeking to meet petitioners' arguments (Petitioners' Brief, pp. 22 ff.) that the public character of Baconsfield tends to bring this case within the rule of *Marsh* v. *Alabama* and other cases, so as to render unlawful its contemplated all-white operation (see *Summary* above, p. 4), the respondents draw large consequences from *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, a case almost entirely unrelated to this one, on its holding. The draft they make on that famous opinion is not honored by its language, as they quote it:

> "But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, . . . " (4 Wheat. 630).

But Baconsfield is not private. It is "dedicated to the public use," in the language of the statute authorizing its creation, Ga. Code §69-504. The funds for keeping it up are

authorized to be "covered" into the City Treasury (R. 24). Its objects, far from being "unconnected with government," are governmental objects, more often attained by governmental action than by any other means.

We have to do here not with a college—planning curriculum along special lines, hiring faculty by acts of judgment, selecting students for special aptitude, choosing books, closed by its very nature to the general public—but with a park, altogether public except for Negroes. The question whether the "private" character of a charitable trust for a college would, if granted, irresistibly (though paradoxically) imply a similarly "private" character in a charitable trust for a public park, is a question that can be sensibly answered only by recourse to the respective (and very different) reasons of the law for supporting these two so dissimilar "charities". Such a comparison is instructive, for it serves to highlight and make both manageable and limitable the definite public character of such trusts as the Bacon trust.

"Schools of learning, free schools, and scholars" are in the Elizabethan statute, 43 Eliz. c. 4; cf. Ga. Code §108-203. Such gifts can be and commonly are limited to restricted classes, and to restricted aspects of education. *Paschal* v. *Acklin*, 27 Tex. 173 (1863); *Dexter* v. *Harvard College*, 176 Mass. 192. A park for the use of one person a year, or of all who could pass a special examination, never was thought to be a charitable object.

The reason, in the case of educational trusts, is succinctly stated in Bogert, Trusts, §375:

> Society will be aided if any or all of its citizens, rich or poor, obtain wisdom, knowledge, skill or culture.

The theory upon which charitable trusts for parks have been sustained, as summed up by the same authority, is different *toto coelo*. The title of the paragraph is included, because it speaks directly to the theoretical question:

§378. Governmental Trusts—Community Benefits

Governments (whether national, state or local) have as their objects the furnishing of facilities and services which will make the lives of their citizens comfortable and safe. They carry benefits of a social nature to large groups. Their work is not confined to distributions for the mere financial enrichment of their inhabitants. Trusts for governmental or municipal purposes are therefore charitable. In the Statute of Charitable Uses these trusts were represented by gifts for the repair of bridges, ports, havens, causeways, sea banks, and highways.

* * * * *

Types of Governmental Benefits

Examples of charitable trusts of this class are to be found where the purpose of the trust was to furnish to the inhabitants water, light, or gas, at cost or less, or supply other public utility services which are usually or occasionally furnished by municipalities; to construct or repair streets, sidewalks, roads, or bridges; to erect or keep in order sea dykes, landing places, levees, docks, and similar works on the ocean or other water fronts; to supplement the existing police or fire departments of a municipality; to establish or aid life saving stations; *to originate or maintain public parks or playgrounds,* and monuments, fountains, gates, or other ornamental or useful structures therein; to pre-

> serve natural scenery, or to beautify public property or private grounds by encouraging the keeping of fine yards and gardens or by planting trees, shrubs, or flowers; or to improve the living conditions of the people, or to promote understanding and good feeling between different groups in society, or to aid the cause of peace. Bogert, Trusts and Trustees, §378, pp. 170, 177-180 (1960). (Emphasis supplied and footnotes omitted.)

This passage has been quoted at length because it is only in a full context that we can perceive how thoroughly the very concept of the charitable trust for a park is saturated with public character. It is held to be charitable precisely because it is public in all its bearings—because its maintenance is a governmental function, and because it is directly accessible to all. (A secondary authority, summing up the law, has been used, because there are no Georgia cases, and it is the general state of the subject that is relevant to the present purpose.) The public character of such a trust as the present, and perhaps even the essentiality of that character to its validity, is recognized very clearly in Georgia Acts 1937, No. 50, p. 594, declaring that "all gifts to the United States, or to any state or to any sub-division thereof for any public purpose, shall be charitable."

We have dealt with this abstract issue, "public *vel non*," because respondents have posed it, but the significance of the term "public" can be assessed only in the context of some purpose, e.g.: Do we mean "public" so as to suggest a parallel with *Terry* v. *Adams*? Or so "public" that the failure of the state affirmatively to prevent racial discrimination is a "denial" of equal "protection" in the community

life—a denial which may result from state "inaction" as well as from state "action"—if, against plausibility, the state be thought not to "act" in its favoring of charitable trusts? For these purposes, the different kinds of charitable trusts may well be not reducible to a single category. This case cannot pose all the issues that will arise in later cases, and we are in no position either to plead future and perhaps hard cases, or to make concessions for those who will be involved in them. But we do submit that where a trust, such as this one, is of a sort held "charitable," with all of state favor such a holding implies, only on the grounds that it extends a benefit immediately to the public at large, and that it performs a function of government, then that trust ought to have to respond to constitutional guarantees. We submit that such a case falls squarely within the principle of *Marsh* v. *Alabama*, 326 U. S. 501; if the streets of the town had been dedicated on charitable trust, with the formal title in a trustee selected by the Company, and the dirty work in the hands of a Board of Managers, could Marsh's conviction have stood? We submit that such a case as the present should be held within the reason of *Terry* v. *Adams*, for a governmental function is as definitely being performed in this case as in that.

Respondents (their Brief, p. 26) imagine horrible results if Baconsfield be opened to all the citizens of Macon. These all disappear when one grants to this Court the capacity to make proper distinctions for reasons of weight. Religious "discriminations" in institutions never opened to the general public may not be "arbitrary" at all, but may on the contrary be implementary to religious liberty; racial discrimination invokes no analogous countervailing constitutional or societal value. The first opinion construing the Fourteenth Amendment, *The Slaughterhouse Cases*, 83 U. S.

(16 Wall.) 36, recognized and emphasized the obvious historic fact that the Amendment was aimed primarily at eliminating racial discrimination; to say that racial discrimination is always forbidden is not to say that every differentiation is always forbidden. At the same time, some of the respondents' horribles need thinking about, when brought closer to this case. Suppose a large public park in Macon were, by the will of a man long dead, open to and frequented by the whole public, except that Roman Catholics were excluded? This example, authentically horrible, seems the logical consequence of the position respondents urge. If every "charitable" trust for a governmental purpose, like this one, is immune from federal constitutional standards, then a few rich men and a compliant city administration could racialize a town, suppress free speech in many of its functionally public places, and impose serious disadvantages on minority religions, without responding to the Fourteenth Amendment. It happens that only Negroes now have to fear a widespread use of the doctrines the respondents urge. But they should not be made, because of their unique political vulnerability in the present time, victims of a theory that has no stopping place short of such a consequence.

IV.

The Appropriate Remedy in This Case (Replying to Respondents' Point II).

In this point, respondents seek to send the federal claim of petitioners wandering in an untraceable labyrinth of state law. As always, this attempt has to fail; the clue, as always, is the Supremacy Clause.

There is more than one way to violate the Fourteenth Amendment. Petitioners claim, to be sure, that segregation of this park by "private" trustees, against the background shown on this record, would in future violate the Fourteenth Amendment. But petitioners also claim that the organs of the State of Georgia may not, in a lawsuit brought for the announced purpose of segregating a facility which by no other means can be segregated, act in concert for the proclaimed end of attaining this segregation. One body appointed by a public authority brought a suit praying that the court so alter the legal position as, on their theory of the matter, to clear the way for segregation. A second body—the City of Macon—obligingly cleared the way, announcing in a resolution of the Council that said that was its purpose. The Superior Court then acted judicially by accepting a resignation tendered on this ground and this ground only, being apprised by the record before it that that was the ground and that the whole proceeding before it had no other aim or expectable effect. Starting with a situation in which, by repeated confession, exclusion of Negroes from Baconsfield was unlawful, these parties, wielding state power, so acted as, at least hopefully, to make it lawful, and (if that hope were doomed to be vain) so as to make it factually possible until another lawsuit was

brought. Whatever else violates the Fourteenth Amendment, that kind of action by state-empowered governmental entities violates that Amendment. State-law categories and state-conferred powers can have no bearing on the matter.

Nor is the remedy in this court unclear or difficult. The decree of the Superior Court, accepting the City's resignation and appointing new trustees, was an essential step in a set of actions violating the Fourteenth Amendment. If this case goes back to the state court under a mandate that that decree be reversed, then what has been done up to now will be undone.

It is quite true that, if "private" trustees are confirmed in their trusteeship, and exclude Negroes from this park, these petitioners or others similarly situated may apply for relief, contending that such segregation violates the Fourteenth Amendment. It is also true that, on one alternative, the merits of the present suit implicate the question that would then be raised, for if exclusion of Negroes by the new trustees would be *unlawful*, then the decree of the Superior Court constituted a substitution of a trustee who proposed to segregate, for one who was not segregating. This judicial action, on the hypothesis that segregation of Baconsfield by any trustee would violate the Fourteenth Amendment, would amount to the appointment by a Georgia court of a trustee who proposed to infringe the Constitution, for the purpose of his infringing it. And the remedy in this court at this step would be just the same—the undoing, by apt mandate, of this judicial action hostile to the federal right.

It is because of its relevance in the second of these alternative theories that petitioners—joined by the United States as *amicus curiae*—have presented argument that

segregation of Baconsfield, in the whole setting, would violate the Fourteenth Amendment, whoever the trustee might be. In the procedural setting of this case, that argument, though very important, is immediately material only as it establishes the impropriety of the lower court's action in bringing about a state of things in which a trustee appointed for the purpose of segregating takes office. But, petitioners also contend that the alteration of affairs so that a previously unlawful segregation could become lawful would be, equally, a forbidden objective for the city councils and the courts of Georgia. *Getting in* a trustee who will segregate is not a proper public objective, whatever the subsequent status of his acts will be.

Respondents argue at length against the availability of the doctrine of *cy pres* in this case, though neither petitioners nor the United States as *amicus* have laid any stress on this point in their briefs here. Petitioners cheerfully concede that Georgia controls her own legal terminology, and that if the state law as defined by the state courts cannot call by the name *cy pres* any doctrine which will require the reversal of this case then another name has to be found. The federal doctrine we invoke will not fail merely because it may not fit into the categories of Georgia law. The federal requirement is that the agencies of a state refrain from so acting as to foster and facilitate segregation. They have so acted in this case, and the exactly tailored corrective measure is a mandate requiring that the unconstitutional steps—the acceptance of the resignation and the appointment of new trustees—be recalled.

In the background is the question whether the consequence of opening of this park will be the failure of the trust and reverter to the heirs. That issue has nowhere

yet been briefed or argued; it seems unlikely that this court would let stand an unconstitutional administrative and judicial action, on the ground that to disturb it might, when all the facts are known and all the arguments heard, result in reverter. At this stage, it seems almost enough to say that the express language of Senator Bacon's will seems to make the feared result impossible (R. 19). At the least, no judicial decree of reversion could pretend to implement Senator Bacon's intention, for, here again his intentions were both clear and legally incompatible—(1) to keep Negroes out of Baconsfield and (2) to keep Baconsfield a park forever. Choice between these would not give effect to his will, but would be a judicial choice between two incompatible terms of his will, a choice which the court, a state agent, and not Senator Bacon would be making. It might be added that the *affirmative* purpose of this trust, a park for white people, will not fail if the park is opened to all, for the white people will have as much access to it as they ever had; to hold that the admission, as well, of colored people vitally frustrates the trust would seemingly have to rest on the proposition that, as a matter of law, proximity to Negroes is so great a detriment to whites as to ruin the park for the latter. If the time ever came, petitioners would say what little needs to be said about the standing of that proposition as a state-law ground for decision, in confrontation with the Fourteenth Amendment.

V.

Respondents, in Their Points III-V, Mistake the Application of *Shelley* v. *Kraemer*, the Significance of the Incompatibility of Bacon's Two Desires, and the Significance of the City's Desegregation.

"In *Shelley* v. *Kraemer*," say respondents, "there was involved the right of a Negro citizen to buy property which the owner desired to sell him . . ." This is a flatly mistaken account of *Shelley* v. *Kraemer*, 334 U. S. 1. *Shelley* actually concerned a plaintiff's invocation of the judicial process to prevent a Negro from being in a certain place, on the ground that state contract and real property law gave the plaintiff the right to keep the Negro from being there. The case involved principally the right of a Negro to *occupy* a house in violation of a covenant against Negro *occupancy*, binding on him as a matter of state law, as against the claim of his neighbor to oust him. In *McGhee* v. *Sipes*, 334 U. S. 1, companion case to *Shelley*, and decided on the same day and on the same grounds, the seller was not even a party; in both cases, it was *occupancy*, not *sale* that was at stake. The negative easement held by the plaintiff in *Shelley* was a property right under state law, as well as a contract right, and consisted in the right to have no Negroes *occupying* the property on which the easement lay; so the state court in *McGhee* described it.

On every ground on which the *Shelley* rule might be defined and limited, the present case is a stronger case than *Shelley*. If the *Shelley* rule is to be limited to a context of public impact of discrimination, the park is more in the public life than is the home or even the neighborhood. If the functional equivalence of racial covenants to racial

zoning contributed to the *Shelley* result, then it can be noted that the result of the Georgia Court's action will be, at least hopefully, the functional equivalent of the same old segregated Baconsfield as run by the City. If public involvements collateral to that of the court (e.g., the recording system in *Shelley*) are needful, those are so extensive and so obvious here as to make enumeration at once onerous and needless. If what avails is the lack of competing constitutional values, none are found here.

The one rationally arguable affirmative objection to this Court's action in *Shelley* was that the discrimination complained of there, though enforced by judicial action, originated in an unequivocal choice by private parties. On that score, this case is far stronger than *Shelley*. In that case, the "private choice" was univalent. Here no facade of "construction" can disguise the fact that Senator Bacon plainly wanted, and said he wanted, two legally incompatible things, (1) an all-white park, and (2) a park held by the City. We may guess that he would have then preferred, or now, if living and looking over the modern world, would prefer, one or the other. But the will, besides providing for exclusion of Negroes, very carefully back-stops the provisions for City control. If the City cannot under its Charter serve as trustee, then the City Council is to appoint the new trustee (a provision ignored in the proceedings below), and that trustee is to act subject to "such safeguards and restrictions" as the City Council imposes. The City is authorized to commingle the trust funds in its own treasury (R. 24). The individual trustees for the life of Mrs. Bacon and the daughters had to report annually to the City. The City is to approve new members of the Board of Managers (another provision ignored in the proceedings below).

With all this in the will, it is not open to any court to say that Bacon's desire for public involvement in the management of the park is not clear. In *Shelley* then, the state court had at least enforced the unambiguous will of contracting parties. In this case, the state court had ineluctably to *choose* between equally clear expressions. Such a choice is inescapably an affirmative judicial act, a choice between policies. Confronted with such a choice, no state organ, court or city or board of managers, or all in concert, can be permitted to choose the policy of segregation in the name of carrying out the will of a private donor.

The respondents, to be sure, invite us to speculate on the relative importance to Bacon of these incompatible provisions. Such speculation, to be applicable at all to the current situation, would have to address itself to the question whether Bacon, whose death was closer to Appomattox than to 1965, would prefer to give up his desire for public control of the park rather than give up his desire to segregate. Would he see a common resort to a public park in a city the size of Macon today as constituting "social relations," the thing he desired to avoid? (R. 21) In 1964, a former Senator from a Confederate state led the way to the passage of the Civil Rights Act, and one Congressman from Bacon's own state voted for it and was re-elected. Might Bacon have come to see the present situation somewhat as they see it? These, the only relevant speculations, would be altogether idle. The only thing we know is that Bacon provided, very deliberately, for discrimination and for public control, and that the organs of the State of Georgia, choosing discrimination at the expense of public control, are not "following" a private man's plan for his property, but choosing, on their own responsibility, between two incompatible features of his plan.

Nor does the relatively passive act of the state court—"accepting" the City's resignation—make that judicial act any the less an affirmative act of the State of Georgia. The seeming passivity of this action was made possible only because of the prior preparation of the situation by other organs of the State. Nor is a trustee's "resignation" either perfunctory or perfunctorily acceptable; see Bogert, *Trusts and Trustees,* §§514-515 (1960). Moreover, the Board of Managers, an organ appointed by the City Council, and wielding public power, asked the court for the removal of the City as trustee, in order that segregation might continue. This action alone would suffice to impart "state action" into the pattern; public officials surely may not take affirmative action, as filing this petition was, for the confessed purpose of perpetuating segregation. Had the state court granted this relief on these grounds, the parallel with *Shelley* would have been too exact to leave room for argument. Instead, another holder of state power, the City, changed its position in the middle of the lawsuit and so acted as to enable the state court to grant, in practical effect, the same relief the petition asked for, under the milder rhetorical figure of "accepting" a resignation. The responsibility of the state for the result cannot be affected by the assignment of different roles in the drama to different wielders of state power.

In any event, the action of the state court *in appointing new trustees* was altogether affirmative. Those trustees were appointed in a proceeding commenced by a petition asking for their appointment on the ground that, if appointed, they could exclude Negroes. They were appointed directly after the City had resigned, on the ground, assigned by itself, that the new trustees could exclude Negroes. This appointment, on the record, is an affirmative judicial act aimed

solely at the perpetuation of a discriminatory regime in Baconsfield.

Nor is it a valid objection that the state court's refusal to accept the City's resignation would have compelled the City to remain as trustee unwillingly. In the first place, on the City's own express admissions, that unwillingness was based solely on its unwillingness to run the park on an open basis; this is not the case of compelling service by a trustee as against general objections, or even as against undisclosed objections, but rather it is a case of following to its obvious consequences the rule that no organ of state power may so act with the intent, purpose and effect exclusively to perpetuate racial discrimination. Nor does it appear that the City's being trustee is in any way onerous; to be "trustee" is simply to operate the park, a normal municipal function. (At all events, the policing of this park must to a considerable extent fall on the City.) Georgia municipalities, moreover, enjoy no general immunity from being compelled to perform affirmative duties; in *McCletchey* v. *Atlanta,* 149 Ga. 648, for example, the City was held compellable by mandamus to make an annual appropriation for operating a "cyclorama" and to build up and keep separate a special fund for this purpose, in obedience to state law—a compulsion more "affirmative," if grounded in a less important power, than a compulsory continuance as trustee, where resignation is confessedly in furtherance of segregation. (It seems nearly unnecessary to add that no general state-law rule, whether common-law or statutory, giving cities in general the power to resign trusts in general, can prevail over an obligation of federal constitutional origin, or fix the quality, for federal constitutional purposes, of the act of resigning.)

Finally, only disorder or needless litigation would flow from this court's regarding the case as not yet raising the segregation issue, and the state court's order as not directly implementing segregation. That order was a first step on a road clearly marked by the parties, who have candidly stamped this suit, and the substitution of trustees with which it terminated, as aimed at segregation only. Petitioners insist, then, that far from being inapplicable here, *Shelley* governs this case. The only anxiety petitioners would feel about *Shelley* is that it would be unfortunate if any of the questionings about *Shelley*, any of the uncertainty about the scope of its rule, entered this case. If *Shelley* had never been decided, this case would still be one presenting a clear pattern of state action. It is saturated with state action. No unequivocal private choice is being enforced. The State of Georgia has chosen among policies, and has chosen the segregation policy, no more following the will of a private person than if the opposite choice had been made. If the order of the state court be thought insufficient alone to constitute state action, then one need only advert to the fact that the whole litigation pattern was set up for the court's action by parties who themselves hold state power, and who confessedly took the actions they took in order that segregation might prevail.

VI.

Respondents Are Wrong in Their Contention That §69-504, Georgia Code, Acts 1905, p. 117, Is Not a Significant Consideration in This Case.

Respondents, confronted with Ga. Code §69-504, a statute that explicitly spells out legal sanction for racially segregated public parks of the Baconsfield sort, insist that that statute is not a "significant consideration." They go on to say:

> In 1904, the year prior to the passage of that statute, a testator in Georgia could *obviously* have created a trust involving a park with a municipal corporation as trustee without inserting any racial restriction. Or he could have created such a trust with a racial restriction. (Respondents' Brief, p. 48.) (Emphasis supplied.)

Respondents, in this passage, create a mystery they fail to dispel. Why, if the law of 1904 was so clear, did the Georgia legislature, in 1905, go to the trouble it did in passing this section?

Petitioners contend that the answer first suggesting itself —that Georgia Law was at the least not clear on this point—is borne out by all the materials now accessible.

First, the Georgia Code of 1895, covering this matter, seems to name no category including parks as a subject of charitable trusts. The Code enumeration is as follows:

> §4008. (3157.) *Subjects of charity.* The following subjects are proper matters of charity for the jurisdiction of equity:

1. The relief of aged, impotent, diseased or poor people.

2. Every educational purpose.

3. Provisions for religious instruction or worship.

4. For the construction or repair of public works, or highways, or other public conveniences.

5. The promotion of any craft or persons engaging therein.

6. For the redemption or relief of prisoners or captives.

7. For the improvement or repair of burying-grounds or tombstones.

8. Other similar subjects, having for their object the relief of human suffering, or the promotion of human civilization.

"The promotion of human civilization" would seem a pretentious statement of the objective of a park; for a state court to hold that segregating a park constitutes such a promotion of civilization would violate the Fourteenth Amendment. No "construction or repair" is the principal subject of this trust. No Georgia court, by the respondents' own account, had ever held any part of this section applicable to a park, in all the years before §69-504 became law. This really is enough to establish the entire uncertainty, in the Georgia law as Senator Bacon new it, of the propositions so confidently put forward by the respondents.

There is much more, however. The respondents, ignoring and not citing the applicable Georgia Code section just quoted, deal with the matter as one of "common law." They do not tell us why that law in its pristine state applied, in

the face of the Code enumeration. More significantly, they do not advert to the grounds on which other jurisdictions than Georgia had upheld charitable trusts for parks. Those grounds were two in number, not unconnected. These are summarized in 4 Pomeroy Equity §1024, as follows:

> 4. *Other Public Purposes.*—Other public purposes, not in the ordinary sense ***benevolent,*** may be valid charities, since they are either expressly mentioned by the statute, or are within its plain intent. All of these purposes tend to benefit the public, either of the entire country or of some particular district, or to lighten the public burdens for defraying the necessary expenses of local administration which rest upon the inhabitants of a designated region.

There being no Georgia cases, this synthesis of the "common law" elsewhere is significant. The park, where held a public charity, is so held because it benefits the whole public, or because its receipt free of charge lightens the expense of the performance of a governmental function. The upholding of racially segregated parks, as objects of public charity, would be a contradiction in terms on the first of these theories, and the second of them so deeply implicates the charitable trust in the governmental plan as to make its enforcement plainly obnoxious to the Fourteenth Amendment, as against the "state action" objection.

Thus, as one would confidently expect when so carefully drawn a statute as §69-504 is put through the state legislature, the prior Georgia law was at least doubtful. It is against the parts of that law that were not doubtful that §69-504, and its operation, are to be judged. A very clear role can be assigned this statute, so mysterious a phenomenon on respondents' account, when one adverts to the law

of parks in Georgia, as plainly seen in the old Georgia cases.

As respondents say, "no Georgia case had dealt with a charity involving a park . . . " But plenty of Georgia cases had dealt with parks, treating them, as the common law traditionally does, as lands "dedicated to the public," the members of the public, as such, having easements of enjoyment in them.

The leading case, never lost sight of in later opinions, is *Mayor and Council of the City of Macon* v. *Franklin*, 12 Ga. 239 (1852). In a luminous opinion, Judge Nisbet learnedly reviews the doctrine of "dedication," concluding:

> Dedications of lands for charitable and religious purposes, and for public highways, are valid without any grantee to hold the fee, and the principle upon which they are sustained, sustains dedications of streets, squares and commons. *City of Cincinnati* vs. *The Lessee of White*, 6 *Peters'* R. 435, 436. *Beatty* vs. *Kurts*, 2 *Peters'* R. 256. *Town of Paulett* vs. *Clark*, 9 *Cranch*, 292. *Lade* vs. *Shepherd*, 2 *Stra.* 2004. 12 *Wheat.* 582.
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> That commons and squares are subjects of dedication, and under the principles which govern streets and highways, see the great case of *The City of Cincinnati* vs. *White's Lessees*, 6 *Peters*, 431. *Watertown* vs. *Cohen*, 4 *Paige* R. 510. *State* vs. *Wilkinson*, 2 *Vermont* R. 480. *Pearsoll* vs. *Post*, 20 *Wend.* 111. 22 *Wend.* 425. (12 Ga. at 244-45.)

The holding of the case was that The *City of Macon* might not sell for a private use land which it had itself "dedicated" to the public as a public square or common.

Other Georgia cases treat public parks and analogous tracts as "dedicated," with reciprocal public easements. *County of Gordon* v. *Mayor of Calhoun,* 128 Ga. 781 (1907), decided a few years after the passage of §69-504, shows that the Georgia court, which by respondents' correct account never dealt with a park as the subject of a charitable trust, thoroughly knew the "common," with its accompanying public easements, as the legal device by which parks were maintained as such. See also *Pettit* v. *Mayor and Council of Macon,* 95 Ga. 645 (1894).

There was, however, one difficulty, not much felt, perhaps, in 1852, the year of *Macon* v. *Franklin,* but later a cloud that could have been seen on the horizon. The "dedication" that creates a public park is *to the public as a whole.* Georgia law was of one voice on this, *Ford* v. *Harris,* 95 Ga. 97, 100 (1894); *East Atlanta Land Co.* v. *Mowrer,* 138 Ga. 380, 388 (1912); *Western Union Telegraph Co.* v. *Georgia Railroad and Banking Co.,* 227 F. 276 (S. D. Ga. 1915). The concept of "dedication" left no room for selecting parts of the "public" to enjoy the public easement; there was no middle ground, conceptually, between the public use, comprehensive as to the public, and the private easement, an unsatisfactory legal basis for operating a public park.

The expectable trouble developed, not as to parks, but as to the analogous case of the cemetery. In *Brown* v. *Gunn,* 75 Ga. 441 (1885), "persons of color" claimed, as members of the public, the right to be buried or to bury their dead in a cemetery they contended had been "dedicated" to the public. The court held, on the facts, that no "dedication" had taken place, but there was no suggestion, in the opinion, that such "dedication" could conceivably, as a matter of law, have been to the white public only.

This, then, was the background of §69-504:

1. No provision in the purportedly exhaustive Code enumeration authorized the setting up of a charitable trust for a park.

2. The "common law" of the subject, outside Georgia, generally rested the inclusion of parks in the subject-matter of charitable trusts on two grounds, one of which was incompatible with racial exclusion and the other of which so deeply involved the interests of government in the operation of the park as to make it likely that "state action" would be found.

3. No Georgia case had ever held a park, racially restricted or not, to be the proper subject of a charitable trust.

4. Georgia's public parks were conceived as "dedicated" commons, with corresponding public easements. This concept, thoroughly familiar to the Georgia court, had no room for restriction to parts of the public. Thus, the only sure and well-travelled way of giving one's land for a public park—"dedicating" it to the public—contained no means of enforcing a racial restriction.

5. In at least one case that got as far as the state's highest court, Negroes, asserting the very claim so irresistibly suggested by all the foregoing, had sought to enjoy their easement in "dedicated" property, and had been turned away only on a narrow finding of fact.

Petitioners are emboldened to think that the situation defined by these numbered points was the one §69-504 was designed to meet, because it is the very situation to which

it appears to address itself. It reads and sounds like remedial legislation, and if it was, this was what it was designed to remedy. In any case, this is the legal background against which it became law.

Against that background §69-504 is no longer the puzzle, the mystery, that respondents have made of it. That section supplies the one thing needful—permission to give land as a park with racial restrictions—and it supplies that alone. Before it was passed, anybody who wanted to give his land as a park for the whole public could "dedicate" it, in the time-honored way. The single practical change the section made was that he now could restrict his gift racially—not in general or in any way he wished, but only racially.

The 1905 statute, then, by the leave and only by the leave of which this racially restrictive term was inserted in Senator Bacon's will, was a specifically hostile state act against the colored race, authorizing clearly, for the first time in Georgia law, their exclusion from parks otherwise public. That was its minimum effect. Here we have what one would never have expected to encounter in such explicit clarity, literally that very thing which Mr. Justice Stewart, concurring in *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 at 727 (1961), found by inference: "... This legislative enactment ... authorizing discrimination based exclusively on color." Here is no mere general declaration of a right to discriminate on any grounds, but rather on the one hand the lending of Georgia's law sanction, for the first time so far as one can tell, to charitable trusts for public parks, with the proviso that racial discrimination and that discrimination alone, is to be permitted—and, on the other hand, the plugging of a loophole

that had made racial discrimination difficult in the law of public parks as it actually had existed in Georgia. Surely one may say, as Mr. Justice Stewart said in *Burton*, "Such a law seems . . . clearly violative of the Fourteenth Amendment." 365 U. S. at 727.

This is the minimum effect of this statute. But is it not also clear that, against this background, any citizen must see that the state is at least suggesting discrimination? Even on respondents' own account, is this not the necessary effect of such a statute? If it were, as they contend, merely declaratory of one consequence of a general capacity in testators to discriminate in any manner, must it not for that very reason function as a mark of the state's special interest in this form of discrimination? Against the legal backdrop that actually existed, on the other hand, it must surely signal to all a state policy of fostering and favoring segregation, evidenced in the most convincing manner by solicitude to make such segregation possible against all previous objections of a technical cast.

Finally, a careful lawyer, seeing in §69-504 his only reliable Georgia authority for setting up a trust for a park, might well be afraid to count on a later time's reading of a statute so clearly racial in its thrust. The verbal problem he would have would not be, as respondents would have this Court believe, that of the meaning of the word "may." The problem would be whether the act which, under the statute, the testator "may" perform is (1) the conveyance of land for a park with or without any of the conditions enumerated; or (2) the conveyance of the land together with the one he chooses from among those conditions. Stranger feats of statutory construction have been per-

formed than a court's reading this language to have the latter meaning.

This general point is not, however, the only reliance in this case. What Senator Bacon actually did, in the first instance, was to leave his land in trust as a park for the *white women and children* of Macon (R. 19). Now §69-504, on its face and with no ambiguity whatever, fails to authorize a gift *to women and children on an unsegregated basis.* It authorizes a gift for white women and children only, *or* for colored women and children only, *or* for women and children of any other race only, but none for women and children of all races together. Had Senator Bacon, therefore, wished to leave his park for *all* women and children, he would have had to conclude that he could not lawfully do so under §69-504, and that if he tried to do so on an alternative "common law" theory he would be met not only by all the difficulties above discussed, but also by the powerful argument that this carefully drawn statute, enumerating permitted discriminations, excluded others by implication. The Board of Managers, to be sure, later opened the park to all whites. But Bacon could not have known they would, and authorized them not to. Under §69-504, he could not have authorized them to exclude all men, and admit all women and children.

The actual effect of all this on Senator Bacon's mind is not important. *Peterson* v. *City of Greenville,* 373 U. S. 244. What is important is that the State of Georgia, in passing this statute:

> (1) Supplied the specific thing its law had lacked—a clear means for a private person's giving his land for a "public" park on racially discriminatory terms.

(2) In the context of prior law, signalled the state's anxious interest in seeing racial discrimination (rather than mere general "freedom of choice") authorized and practiced.

(3) Engendered legal doubt that any trust for a park would be valid without racial discrimination, and, unless its readable text and normal implications be ignored, made flatly unlawful the non-racist rule of admission—"women and children only"—corresponding to the racist rule—"white women and children only"—actually adopted in this case, thus in effect commanding segregation by race if a "women and children" park was wanted.

Respondents say that this section is "not significant," and that petitioners' attempt to have the Court view it as being so "will not bear analysis." On the foregoing considerations, petitioners submit that respondents have mistaken the position.

CONCLUSION

The acceptance of the City's resignation and the appointment of new trustees constituted a judicial action confirmatory of actions of other organs of state power, having the express sole aim of reinstituting racial discrimination in Baconsfield. While petitioners strongly urge that this renewed segregation is in itself illegal, the decree entered violates the Fourteenth Amendment, on either of the two possible views as to the latter question. Respondents' arguments fail to cast serious doubt on this conclusion.

Petitioners therefore renew their prayer that the judgment of the Supreme Court of Georgia be reversed, and that the reversal of the Superior Court's decree be ordered.

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SUPREME COURT OF THE UNITED STATES

No. 61.—October Term, 1965.

E. S. Evans et al., Petitioners, v. Charles E. Newton et al. } On Writ of Certiorari to the Supreme Court of the State of Georgia.

[January 17, 1966.]

Mr. Justice Douglas delivered the opinion of the Court.

In 1911 United States Senator Augustus O. Bacon executed a will that devised to the Mayor and Council of the City of Macon, Georgia, a tract of land which, after the death of the Senator's wife and daughters, was to be used as "a park and pleasure ground" for white people only, the Senator stating in the will that while he had only the kindest feeling for the Negroes he was of the opinion that "in their social relations the two races (white and negro) should be forever separate." The will provided that the park should be under the control of a Board of Managers of seven persons, all of whom were to be white. The city kept the park segregated for some years but in time let Negroes use it, taking the position that the park was a public facility which it could not constitutionally manage and maintain on a segregated basis.[1]

Thereupon, individual members of the Board of Managers of the park brought this suit in the state court against the City of Macon and the trustees of certain residuary beneficiaries of Senator Bacon's estate asking that the city be removed as trustee and that the court

[1] *Watson* v. *Memphis*, 373 U. S. 526. And see *Mayor & City Council of Baltimore* v. *Dawson*, 350 U. S. 877 (bathhouses).

appoint new trustees, to whom title to the park would be transferred. The city answered, alleging it could not legally enforce racial segregation in the park. The other defendants admitted the allegation and requested that the city be removed as trustee.

Several Negro citizens of Macon intervened, alleging that the racial limitation was contrary to the laws and public policy of the United States, and asking that the court refuse to appoint private trustees. Thereafter the city resigned as trustee and amended its answer accordingly. Moreover, other heirs of Senator Bacon intervened and they and the defendants other than the city asked for reversion of the trust property to the Bacon estate in the event that the prayer of the petition were denied.

The Georgia court accepted the resignation of the city as trustee and appointed three individuals as new trustees, finding it unnecessary to pass on the other claims of the heirs. On appeal by the Negro intervenors, the Supreme Court of Georgia affirmed, holding that Senator Bacon had the right to give and bequeath his property to a limited class, that charitable trusts are subject to supervision of a court of equity, and that the power to appoint new trustees so that the purpose of the trust would not fail was clear. 220 Ga. 280, 138 S. E. 2d 573. The case is here on a writ of certiorari. 380 U. S. 971.

There are two complementary principles to be reconciled in this case. One is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses. The other is the constitutional ban in the Equal Protection Clause of the Fourteenth Amendment against state-sponsored racial inequality, which of course bars a city from acting as trustee under a private will that serves the racial segregation cause. *Pennsylvania* v. *Board of Trusts*, 353 U. S.

230. A private golf club, however, restricted to either Negro or white membership is one expression of freedom of association. But a municipal golf course that serves only one race is state activity indicating a preference on a matter as to which the State must be neutral.[2] What is "private" action and what is "state" action is not always easy to determine. See *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715. Conduct that is formally "private" may become so entwined with governmental policies or so impregated with a governmental character as to become subject to the constitutional limitations placed upon state action. The action of a city in serving as trustee of property under a private will serving the segregated cause is an obvious example. See *Pennsylvania* v. *Board of Trusts*, *supra*. A town may be privately owned and managed, but that does not necessarily allow the company to treat it as if it were wholly in the private sector. Thus we held in *Marsh* v. *Alabama*, 326 U. S. 501, that the exercise of constitutionally protected rights on the public streets of a company town could not be denied by the owner. A State is not justified, we said, in "permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties . . . ." *Id.*, at 509. We have also held that where a State delegates an aspect of the elective process to private groups, they become subject to the same restraints as the State. *Terry* v. *Adams*, 345 U. S. 461. That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.

Yet generalizations do not decide concrete cases. "Only by sifting facts and weighing circumstances"

[2] *Holmes* v. *City of Atlanta*, 350 U. S. 879; *New Orleans Park Assn.* v. *Detiege*, 358 U. S. 54.

(*Burton* v. *Wilmington Parking Authority, supra,* at 722) can we determine whether the reach of the Fourteenth Amendment extends to a particular case. The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions. While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own parochial educational systems. *Pierce* v. *Society of Sisters,* 268 U. S. 510.

If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume *arguendo* that no constitutional difficulty would be encountered.[3]

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[3] It is argued that this park was a product of Georgia's policy to allow charitable trusts of public facilities to be segregated. A Georgia statute permitted any person to grant a municipal corporation land in trust to the public use as a park on a racially segregated basis. Ga. Code Ann. § 69–504. And a companion measure authorized municipal corporations to accept such grants and to enforce the racial limitations. *Id.,* § 69–505. This policy, it is urged, had a "coercive effect" (*Lombard* v. *Louisiana,* 373 U. S. 267, 273) implicating Georgia in racial discrimination, for without that legislative pattern for segregation a testator would have had to travel an uncertain course to reach that end. Before § 69–504 was enacted, an attempt to establish a trust such as this would have faced numerous difficulties. The pre-1905 statutory law did not expressly include parks as a proper subject of charitable trusts, although it was specific in other regards. See Ga. Code § 4008 (1895). And Georgia's public parks were conceived of as "dedicated" commons with an easement in favor of the general public. See *Mayor & Council of Macon* v. *Franklin,* 12 Ga. 239. The concept of dedication meant that the property was to benefit the public as a whole. *Ford* v. *Harris,* 95 Ga. 97, 101, 22 S. E. 144; *East Atlanta Land Co.* v. *Mower,* 138 Ga. 380, 388, 75 S. E. 418. It would have posed con-

This park, however, is in a different posture. For years it was an integral part of the City of Macon's activities. From the pleadings we assume it was swept, manicured, watered, patrolled, and maintained by the city as a public facility for whites only, as well as granted tax exemption under Ga. Code Ann. § 92–201. The momentum it acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of "private" trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility. Whether these public characteristics will in time be dissipated is wholly conjectural. If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment just as the private utility in *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 462 remained subject to the Fifth Amendment because of the surveillance which federal agencies had over its affairs. We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector.

This conclusion is buttressed by the nature of the service rendered the community by a park. The service rendered even by a private park of this character is municipal in nature. It is open to every white person, there being no selective element other than race. Golf

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ceptual difficulties, to say the least, to dedicate land to the public as a whole, at the same time excluding the members of the Negro race. Cf. *Brown* v. *Gunn*, 75 Ga. 441, in which this point was disposed of only by finding that, on the particular facts of that case, there was no "dedication." We think it likely that it was the very difficulties discussed here that § 69–504 was intended to eliminate. We do not, however, reach the question whether the State facilitated, through this legislative action, the establishment of segregated parks.

clubs, social centers, luncheon clubs, schools such as Tuskegee was at least in origin,[4] and other like organizations in the private sector are often racially oriented. A park on the other hand, is more like a fire department or police department that traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain, *Watson* v. *Memphis, supra;* and state courts that aid private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment. Like the streets of the company town in *Marsh* v. *Alabama, supra,* the elective process of *Terry* v. *Adams, supra,* and the transit system of *Public Utilities Comm'n* v. *Pollak, supra,* the predominant character and purpose of this park is municipal.

Under the circumstances of this case, we cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law. We may fairly assume that had the Georgia courts been of the view that even in private hands the park may not be operated for the public on a segregated basis, the resignation would not have been approved and private trustees appointed. We put the matter that way because on this record we cannot say that the transfer of title *per se* disentangled the park from segregation under the municipal regime that long controlled it.

Since the judgment below gives effect to that purpose, it must be and is

Reversed.

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[4] Ala. Laws 1880–1881, pp. 395–396; Ala. Laws, 1882–1883, pp. 392–393.

SUPREME COURT OF THE UNITED STATES

No. 61.—October Term, 1965.

E. S. Evans et al., Petitioners, v. Charles E. Newton et al. } On Writ of Certiorari to the Supreme Court of the State of Georgia.

[January 17, 1966.]

Mr. Justice White, concurring.

As Mr. Justice Black emphasizes, this case comes to us in the very narrow context of a state court judgment accepting the resignation of a trustee and appointing successor trustees. The lower court judgment does not enjoin the new trustees to comply with the racial restriction in the trust, and there is therefore not presented for decision the question whether, should the trustees fail to exclude Negroes from the park, state judicial enforcement of the racial restriction would constitute discriminatory state action forbidden by the Equal Protection Clause of the Fourteenth Amendment. See *Bell* v. *Maryland*, 378 U. S. 226, 328–331 (dissenting opinion). But we do have properly before us, in my opinion, the question of whether the Fourteenth Amendment prohibits the new trustees from voluntarily excluding Negroes. This is so because decision of the state law questions in this case was not independent of that federal question. The city's resignation, its acceptance by the state courts, and the appointment of new trustees were all based on the premise that the city could not, but private trustees could, obey the racial restriction in the trust without violation of the Federal Constitution. If that premise was incorrect, this Court should vacate the judgment below and remand for further consideration of the state law issues free from the compulsion of an

erroneous view of federal law. *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1, 5; *Minnesota* v. *National Tea Co.*, 309 U. S. 551; *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511.

That the Fourteenth Amendment prohibits operation of the park on a segregated basis so long as the city is trustee is of course not disputed. See cases cited by the majority, *ante*, n. 1. Whether the successor trustees may themselves operate the park on a segregated basis is the question. The majority holds that they may not. I agree, but for different reasons.

To a large extent the majority grounds its conclusion that exclusion of Negroes from the park after the change in trustees would be state action and thus violative of the Fourteenth Amendment on the existence of prior municipal involvement in the operation of the park.

> "The momentum [the park] acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of 'private' trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility. Whether these public characteristics will in time be dissipated is wholly conjectural. . . . We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector." *Ante*, at 5.

It is equally evident that the record does not show continued involvement of the city in the operation of the park—the record is silent on this point. On the contrary, the city's interest would seem to lead it to cut all ties with the operation of the park. It must be as clear to the city as to this Court that if the city remains "entwined in the management or control of the park, it

remains subject to the restraints of the Fourteenth Amendment," *ante*, p. 5; and should segregation in the park be barred, the residuary beneficiaries would undoubtedly press their claim that failure of the trust purpose expressed in the racial restriction results in reversion of the park property. It seems unlikely that the city would act so as unnecessarily to jeopardize the continued existence of this centrally located park, which comprises about 100 acres and is one of the city's largest parks.

That the city's own interest might lead it to extricate itself at once from operation of the park does not, of course, necessarily mean that it has done so; and I am no more inclined than the majority to resolve this question by conjecture. I refer to possible inferences from the city's self-interest solely to emphasize that the record affords absolutely no basis for inferring continued involvement of the city in the management and control of the park. What the majority has done is to raise a presumption of one fact by showing the absence of proof of the converse. To postulate in this manner that the city's involvement has not been dissipated is simply a disguised form of conjecture and, I submit, is an insufficient basis for decision of this case.

I would nevertheless hold that the racial condition in the trust may not be given effect by the new trustees because, in my view, it is incurably tainted by discriminatory state legislation validating such a condition under state law. The state legislation to which I refer is §§ 69–504 and 69–505 of the Georgia Code, which were adopted in 1905, just six years before Senator Bacon's will was executed. Sections 69–504 and 69–505 make lawful charitable trusts "dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose" and provide that "the use of said park, pleasure ground, or other property so conveyed to said

municipality [may] be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only . . . ."[1]

As this legislation does not compel a trust settlor to condition his grant upon use only by a racially designated class, the State cannot be said to have directly coerced private discrimination. Nevertheless, if the validity of the racial condition in Senator Bacon's trust would have been in doubt but for the 1905 statute and if the statute removed such doubt only for racial restric-

[1] "69-504. *Gifts for public parks or pleasure grounds.*—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property.

"69-505. *Municipality authorized to accept.*—Any municipal corporation, or other persons natural or artificial, as trustees, to whom such devise, gift, or grant is made, may accept the same in behalf of and for the benefit of the class of persons named in the conveyance, and for their exclusive use and enjoyment; with the right to the municipality or trustees to improve, embellish, and ornament the land so granted as a public park, or for other public use as herein specified, and every municipal corporation to which such conveyance shall be made shall have power, by appropriate police provision, to protect the class of persons for whose benefit the devise or grant is made, in the exclusive used [*sic*] and enjoyment thereof." Ga. Code Ann. §§ 69-504 and 69-505 (1957).

tions, leaving the validity of nonracial restrictions still in question, the absence of coercive language in the legislation would not prevent application of the Fourteenth Amendment. For such a statute would depart from a policy of strict neutrality in matters of private discrimination by enlisting the State's assistance only in aid of racial discrimination and would so involve the State in the private choice as to convert the infected private discrimination into state action subject to the Fourteenth Amendment. Compare *Robinson* v. *Florida*, 378 U. S. 153; *Lombard* v. *Louisiana*, 373 U. S. 267; *Peterson* v. *City of Greenville*, 373 U. S. 244. Although there are no Georgia decisions directly on the point and the question is therefore not free from doubt, the available authorities have led me to conclude that §§ 69–504 and 69–505 did involve the State in the private choice by favoring private racial discrimination over private discrimination based on grounds other than race.

Apart from §§ 69–504 and 69–505, the Georgia statute governing the determination of permissible objects of charitable trusts is § 108–203.[2] This statute "almost copies the statute of 43d Elizabeth," *Newson* v. *Starke*, 46 Ga. 88, 92 (1872), and has the effect of fully adopting in Georgia the common law of charities, *Jones* v. *Haber-*

[2] "108–203. *Subjects of charity.*—The following subjects are proper matters of charity for the jurisdiction of equity:

"1. Relief of aged, impotent, diseased, or poor people.

"2. Every educational purpose.

"3. Religious instruction or worship.

"4. Construction or repair of public works, or highways, or other public conveniences.

"5. Promotion of any craft or persons engaging therein.

"6. Redemption or relief of prisoners or captives.

"7. Improvement or repair of cemeteries or tombstones.

"8. Other similar subjects, having for their object the relief of human suffering or the promotion of human civilization." Ga. Code Ann. § 108–203 (1959).

sham, 107 U. S. 174, 180. We may therefore expect general charitable trust principles to be as fully applicable in Georgia as elsewhere in the several States. Under such principles, there is grave doubt concerning whether a charitable trust for a park could be limited to the use of less than the whole public.

In the leading case of *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A. C. 531, 583, Lord Macnaghten established the classification of charitable trusts that, with some modifications, has since prevailed:

> " 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

See also Restatement (Second), Trusts § 368 (1959). A more general test of what is charitable is whether the accomplishment of the trust purpose "is of such social interest to the community as to justify permitting property to be devoted to the purpose in perpetuity." 4 Scott on Trusts § 368, at 2629–2630 (2d ed. 1956). The first three categories identified by Lord Macnaghten designate trust purposes that have long been recognized as beneficial to the community as a whole—whether or not immediate benefit is restricted to a relatively small group—and that therefore satisfy the general test stated by Professor Scott. See Restatement (Second), Trusts § 374, comment *a* (1959). But the present trust falls under the fourth category and can therefore be sustained as charitable only because the generality of user beneficiaries establishes that it is beneficial to the community. Otherwise a trust to establish a country club for the use of the residents of the wealthiest part of town would

be charitable. Professor Scott states this principle as follows:

> "As we have seen, a trust to promote the happiness or well-being of members of the community is charitable, although it is not a trust to relieve poverty, advance education, promote religion or protect health. In such a case, however, *the trust must be for the benefit of the members of the community generally* and not merely for the benefit of a class of persons." 4 Scott on Trusts, § 375.2, at 2715 (2d ed. 1956). (Emphasis added.)

Accord, *Trustees of New Castle Common* v. *Megginson*, 1 Boyce 361, 376, 77 A. 565, 571 (Sup. Ct. Del. 1910) (trust for town common was charitable; "[i]t is public, because it relates to all the inhabitants of a particular community and not to any classification of such inhabitants, or to any group thereof separately from the other inhabitants by any distinction of race, creed, social rank, wealth, poverty, occupation, or business . . ."); Restatement, Trusts, § 375, comments *a* and *c* (1935); Restatement (Second), Trusts, § 375, comment *a* (1959); see also Bogert on Trusts, § 378 (2d ed. 1964).[3] Apart

[3] This precise question had been mooted in England a few years before the 1905 Georgia enactment in the case of *In re Christchurch Inclosure Act*, 38 Ch. D. 520 (1888), aff'd, [1893] A. C. 1, and it appears the English rule may differ from the American rule. The Christchurch Inclosure Act gave tenants in certain cottages the right in a designated common to cut turf for fuel. In the case before the court, it was clear the act had to be given effect in some manner, but the court expressed great difficulty in giving it effect as creating a charitable trust. "For, although the occupiers of these cottages may have been, and perhaps were, poor people, the trust is not for the poor occupiers, but for all the then and future occupiers, whether poor or not. Moreover, the trust is not for the inhabitants of a parish or district, but only for some of such persons." *Id.*, at 530. Nevertheless, the court felt bound to hold such a trust was charitable on the authority of a dictum by Lord Selborne

from the present case, no Georgia cases dealing with trusts for general community purposes have been found, see Smith, The Validity of Charitable Gifts in Georgia, 1 Ga. B. J. 16, 26–27 (Feb. 1939), but the available Georgia authorities are consistent with the rule enunciated by Scott. Compare *Bramblett* v. *Trust Co. of Georgia*, 182 Ga. 87, 185 S. E. 72 (1936) (trust to establish "home for gentlewomen" not charitable), with *Houston* v. *Mills Memorial Home*, 202 Ga. 540, 43 S. E. 2d 680 (1947) (trust for Negro old folks home is charitable).[4] On the whole, therefore, I conclude that prior to the 1905 legislation it would have been extremely doubtful whether

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in *Goodman* v. *Mayor of Saltash*, 7 App. Cas. 633, 642 (1882) (trust for a fishery for the use of all "free inhabitants of ancient tenements" held charitable), that "[a] gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust . . . ." Lord Blackburn dissented in *Goodman* v. *Mayor of Saltash*, saying that "though there are many cases to the effect that a trust for public purposes, not confined to the poor, may be considered charitable for many purposes, I do not know of any that say that such a trust as is now supposed would be taken out of the rule against perpetuities . . . ." *Id.*, at 662. No doubt Lord Selborne's view of what constituted a trust for the benefit of the public generally was colored by feudal traditions and the long history of royal charters to the burghers, or "free inhabitants" of a town (in fact, the trust in *Goodman* v. *Mayor of Saltash* was a fictional one created by supposing the prior existence of such a charter, now lost), while the American rule enunciated by Scott is in keeping with the American democratic tradition, which in turn is reflected by the Georgia cases regarding dedication of land to public use discussed by the majority, *ante*, at 4, n. 3.

[4] The trust in *Mills Memorial Home* was specifically recognized as charitable by § 108–203 (1) ("Relief of aged, impotent, diseased, or poor people"), see note 2, *supra*, while the trust in *Bramblett* would be classifiable as one to promote the happiness or well-being of members of the community at large and would thus be tested by the standard of generality stated by Professor Scott.

§ 108–203 authorized a trust for park purposes when a portion of the public were to be excluded from the park.

Sections 69–504 and 69–505 clearly permit exclusion of a portion of the public if such exclusion is on racial grounds. At the same time, those sections appear to make nonracial restrictions on the user of a park created by trust even more doubtful. Section 69–504 authorizes the conveyance of land "dedicated in perpetuity to the public use as a park" and also provides that such a conveyance may limit user on racial grounds. The natural construction of this provision would be that it authorizes a trust only for the use of the whole public or for the use of a racially designated subpart of the public, but not for the use of some other portion of the public such as men only or Irish persons only. Such an interpretation follows from the maxim *expressio unius est exclusio alternius* and from the dedication cases to which the majority refers, *ante*, at 4, n. 3, which indicate that the expression "dedicated in perpetuity to the public use as a park" means dedication to the public as a whole and not some portion of the public. See also *Western Union Telegraph Co.* v. *Georgia R. & Banking Co.*, 227 F. 276, 285 (D. C. S. D. Ga. 1915). " 'There can be no dedication, strictly speaking, to private uses, nor even to uses public in their nature, but the enjoyment of which is restricted to a limited part of the public' "). One commentator has suggested that § 69–504 was intended to expand clause 4 of § 108–203, see note 2, *supra*, *i. e.*, "to enlarge 'public works' or 'public conveniences' to include public parks or pleasure grounds . . . ." Smith, The Validity of Charitable Gifts in Georgia, 1 Ga. B. J. 16, 27 (Feb. 1939). On that assumption, the sole authority for holding gifts in trust for park purposes to be charitable would be § 69–504, and that section clearly makes nonracial restrictions on use of such parks more

doubtful than racial restrictions. Even if § 69–504 is regarded as a clarification of prior law, rather than an addition to it, it has the same effect of casting doubt on the validity of nonracial restrictions.

This case must accordingly be viewed as one where the State has forbidden all private discrimination except racial discrimination. As a result, "the State through its regulations has become involved to such a significant extent" in bringing about the discriminatory provision in Senator Bacon's trust that the racial restriction "must be held to reflect . . . state policy and therefore to violate the Fourteenth Amendment." *Robinson* v. *Florida*, 378 U. S. 153, 156–157. For the reasons stated, I would vacate the judgment of the Georgia court and remand the case for further proceedings.

SUPREME COURT OF THE UNITED STATES

No. 61.—October Term, 1965.

E. S. Evans et al., Petitioners, v. Charles E. Newton et al. } On Writ of Certiorari to the Supreme Court of the State of Georgia.

[January 17, 1966.]

Mr. Justice Black, dissenting.

I find nothing in the United States Constitution that compels any city or other state subdivision to hold title to property it does not want or to act as trustee under a will when it chooses not to do so. And I had supposed until now that the narrow question of whether a city could resign such a trusteeship and whether a state court could appoint successor trustees depended entirely on state law. Here, however, the Court assumes that federal power exists to reverse the Supreme Court of Georgia for affirming a Georgia trial court's decree which as the State Supreme Court held, did only these "two things: (1) accepted the resignation of the City of Macon as trustee of Baconsfield; and (2) appointed new trustees." 220 Ga. 280, 284; 138 S. E. 2d 573, 576.

The State Supreme Court's interpretation of the scope and effect of this Georgia decree should be binding upon us unless the State Supreme Court has somehow lost its power to control and limit the scope and effect of Georgia trial court decrees relating to Georgia wills creating Georgia trusts of Georgia property. A holding that ignores this state power would be so destructive of our state judicial systems that it could find no support, I think, in our Federal Constitution or in any of this Court's prior decisions. For myself, I therefore accept the decision of the Georgia Supreme Court as holding

only what it declared it held, namely, that the trial court committed no error under Georgia law in accepting the City of Macon's resignation as trustee and in appointing successor trustees to execute the Bacon trust.

I am not sure that the Court is passing at all on the only two questions the Georgia Supreme Court decided in approving the city's resignation as trustee and the appointment of successors. If the Court is holding that a State is without these powers, it is certainly a drastic departure from settled constitutional doctrine and a vastly important one which, I cannot refrain from saying, deserves a clearer explication than it is given. Ambiguity cannot, however, conceal the revolutionary nature of such a holding, if this is the Court's holding, nor successfully obscure the tremendous lopping off of power heretofore uniformly conceded by all to belong to the States. This ambiguous and confusing disposition of such highly important questions is particularly disturbing to me because the Court's discussion of the constitutional status of the park comes in the nature of an advisory opinion on federal constitutional questions the Georgia Supreme Court did not decide. Consequently, for all the foregoing reasons and particularly since the Georgia courts decided no federal constitutional question, I agree with my Brother HARLAN that the writ of certiorari should have been dismissed as improvidently granted.

Questions of this Court's jurisdiction would be different, of course, if either the mere resignation or appointment of trustees under a will was prohibited by some federal constitutional provision. But there is none. The Court implies, however, that the city's resignation and the state court's appointment of new trustees amounted to "state-sponsored racial inequality," which, of course, if correct, would present a federal constitutional question. This suggestion rests on a further implication by the Court that the Georgia court's decree

would result in the operation of Baconsfield Park on a racially segregated basis. The record here, for several reasons, can support no such implications: (1) the State Supreme Court specifically limited the effect of the decree it affirmed to approval of the city's resignation as trustee and the appointment of new ones; (2) the new trustees were not directed to operate the park on a discriminatory basis; and (3) there is no indication that they have done so. Furthermore, where a valid law makes a certain use of property held in trust illegal, responsibility for its illegal use cannot be escaped by putting it in the hands of new trustees. Cf., *e. g., Mormon Church* v. *United States,* 136 U. S. 1, 47–48.

The ambiguous language used by the Court even casts doubt upon Georgia's power to hold that the trust property here can revert to the heirs of Senator Bacon if the conditions upon which he created the trust should become impossible of being carried out. The heirs of Senator Bacon raised the issue of reversion below, but neither court reached it. So far as I have been able to find, the power of a State to decide such a question has been taken for granted in every prior opinion this Court has ever written touching this subject. I believe that Georgia's complete power to decide this question is so clear that no doubt should be cast on it as I think the Court's opinion does. But if this Court is to exercise jurisdiction in this case and hold, despite the fact that the state court's decree did not adjudicate any such question, that the new successor trustees cannot constitutionally operate the park in accordance with Senator Bacon's will, then I think that the Court should explicitly state that the question of reversion to his heirs is controlled by state law and remand the case to the Georgia Supreme Court to decide that question.

Nothing that I have said is to be taken as implying that Baconsfield Park could at this time be operated by

successor trustees on a racially discriminatory basis. Questions of equal protection of all people without discrimination on account of color are of paramount importance in this Government dedicated to equal justice for all. We can accord that esteemed principle the respect it is due, however, without distorting the constitutional structure of our Government by taking away from the States that which is their due.

SUPREME COURT OF THE UNITED STATES

No. 61.—October Term, 1965.

E. S. Evans et al., Petitioners, v. Charles E. Newton et al. } On Writ of Certiorari to the Supreme Court of the State of Georgia.

[January 17, 1966.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, dissenting.

This decision, in my opinion, is more the product of human impulses, which I fully share, than of solid constitutional thinking. It is made at the sacrifice of long-established and still wise procedural and substantive constitutional principle. I must respectfully dissent.

I.

In my view the writ should be dismissed as improvidently granted because the far-reaching constitutional question tendered is not presented by this record with sufficient clarity to require or justify its adjudication, assuming that the question is presented at all.

In the posture in which this case reached the state courts it required of them no more than approval of the city's resignation as trustee under Senator Bacon's will and the appointment of successor trustees. Neither of these issues of course would in themselves present a federal question. While I am inclined to agree with my Brother Black that this is all the state courts decided, I think it must be recognized that the record is not wholly free from ambiguity on this score. Even so, the writ should be dismissed. To infer from the Georgia Supreme Court's opinion, as the majority here does, a further holding that the new trustees are entitled to operate Baconsfield on a racially restricted basis, is to stretch for a constitutional issue. This plainly contravenes the estab-

lished rule that this Court will not reach constitutional questions if their decision can reasonably be avoided. *Peters* v. *Hobby*, 349 U. S. 331; *United States* v. *Rumely*, 345 U. S. 41; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 553. Application of that doctrine is especially called for here where decision should require precise knowledge of the factual details and nuances that only time and a complete record can bring into focus. Dismissal of the writ should thus follow.

II.

On the merits, which I reach only because the Court has done so, I do not think that the Fourteenth Amendment permits this Court in effect to frustrate the terms of Senator Bacon's will, now that the City of Macon is no longer connected, so far as the record shows, with the administration of Baconsfield. If the majority is in doubt that such is the case, it should remand for findings on that issue and not reverse.

The Equal Protection Clause reaches only discriminations that are the product of capricious state action; it does not touch discriminations whose origins and effectuation arise solely out of individual predilections, prejudices, and acts. *Civil Rights Cases*, 109 U. S. 3. So far as the Fourteenth Amendment is concerned the curtailing of private discriminatory acts, to the extent they may be forbidden at all, is a matter that is left to the States acting within the permissible range of their police power.

From all that now appears, this is a case of "private discrimination." Baconsfield had its origin not in any significant governmental action [1] or on any public land

[1] The majority disclaims reliance on the early Georgia charitable trust statutes authorizing the establishment of racially restricted parks and permitting a city to act as trustee under such a trust. My Brother WHITE, however, finds that the mere existence of those statutes, enacted in 1905, "incurably taint[s]" the racial conditions

but rather in the personal social philosophy of Senator Bacon and on property owned by him. The City of Macon's acceptance and, until recent years, its carrying out of the trusteeship were both entirely legitimate, and indeed in accord with the prevailing *mores* of the times. When continuance of its trusteeship became incompatible with later changes in constitutional doctrine, the city first undertook to disregard the racial restrictions imposed by the will on the use of the park, and then when that action was appropriately challenged, resigned as trustee. The state courts, obedient to federal commands, *Pennsylvania* v. *Board of Trusts*, 353 U. S. 230, have accepted the resignation of the city, and, to prevent failure of the trust under their own laws, have appointed new trustees. I can see nothing in this straightforward

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of Senator Bacon's will (*ante*, p. 3). For several reasons that thesis seems to me to fall short. First, it is by no means clear that Georgia common law would not have permitted user restrictions on such a park in trust, so that the statute was but declaratory of existing law *pro tanto*. See, *e. g.*, *Houston* v. *Mills Memorial Home*, 202 Ga. 540, 43 S. E. 2d 680 (permitting trust for home for Negro aged). Thus even on my Brother WHITE's premise that a State in allowing discrimination may not discriminate among possible user restrictions, the proper course would be to remand to the Georgia courts to determine whether user-restricted trusts such as Senator Bacon's were in any event valid under the state common law. Second, in order to find an "incurable taint" of the racial conditions rather than an arguable claim turning on state common law, it is apparently suggested that the state statutes invalidly "removed . . . doubt only for racial restrictions" (*ante*, pp. 4–5) and by this clarification improperly encouraged Senator Bacon to discriminate. There is, however, absolutely no indication whatever in the record that Senator Bacon would have acted otherwise but for the statute, a gap in reasoning that cannot be obscured by general discussion of state "involvement" or "infection." Third, it could hardly be argued that the statute in question was unconstitutional when passed, in light of the then-prevailing constitutional doctrine; that being so, it is difficult to perceive how it can now be taken to have tainted Senator Bacon's will at the time he made his irrevocable choice.

train of events which justifies finding "state action" of the kind necessary to bring the Fourteenth Amendment into play.

The first ground for the majority's state action holding rests on nothing but an assumption and a conjecture. The assumption is that the city itself maintained Baconsfield in the past. The conjecture is that it will continue to be connected with the administration of the park in the future. The only underpinning for the assumption is the circumstance that over the years Baconsfield has geographically become an adjunct to the city's park system and the admitted fact that until the present proceeding, title to it was vested in the city as trustee. The only predicate for the majority's conjecture as to the future is the failure of the record to show the contrary.

If speculation is the test, the record more readily supports contrary inferences. Papers before us indicate that Senator Bacon left other property in trust precisely in order to maintain Baconsfield.[2] Why should it be assumed that these resources were not used in the past for that purpose, still less that the new trustees, now faced with a challenge as to their right to effectuate the terms of Senator Bacon's trust, will not keep Baconsfield privately maintained in all respects? Further, the city's and state courts' readiness to sever ties between the city and park in derogation of the will, let alone the city's earlier operation of the park on a nonsegregated basis despite the terms of the will, strongly indicate that they will not flinch from completing the separation of park and state if any ties remain to implicate the Fourteenth Amendment.

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[2] See R. 20, 22, for provisions of Senator Bacon's will allotting property for "the management, improvement and preservation" of the park.

For me this facet of the majority's opinion affords a wholly unacceptable basis for imputing unconstitutional state action, resting as it does on pure surmise and conjecture, and implausible ones at that.[3]

III.

Quite evidently uneasy with its first ground of decision, the majority advances another which ultimately emerges as the real holding. This ground derives from what is asserted to be the "public character" (*ante*, p. 6) of Baconsfield and the "municipal . . . nature" of its services (*ante*, p. 5). Here it is not suggested that Baconsfield will use public property or funds, be managed by the city, enjoy an exclusive franchise, or even operate under continuing supervision of a public regulatory agency. State action is inherent in the operation of Baconsfield quite independently of any such factors, so it seems to be said, because a privately operated park whose only criterion for exclusion is racial is within the "public domain" (*ante*, p. 6).

Except for one case which will be found to be a shaky precedent, the cases cited by the majority do not support this novel state action theory. *Public Utilities*

[3] Twice in its opinion the majority intimates it might reach a different conclusion on the city's involvement if it had a fully developed record before it. At p. 5, *ante*, the Court says, "We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector." And in concluding at p. 6, *ante*, the opinion reads: "We put the matter that way because on this record we cannot say that the transfer of title *per se* disentangled the park from segregation under the municipal regime that long controlled it." These cautions seem to reinforce the point made at the outset of this dissent that the Court should have refused to adjudicate the constitutional issue on this cloudy record. See *Rescue Army* v. *Municipal Court*, 331 U. S. 549.

Comm'n v. *Pollak*, 343 U. S. 451, applied due process standards, limited like equal protection standards to instances involving state action, to certain action of a private citywide transit company. State action was explicitly premised on the close legal regulation of the company by the public utilities commission and the commission's approval of the particular action under attack. The conclusion might alternatively have rested on the near-exclusive legal monopoly enjoyed by the company, 343 U. S., at 454, n. 1, but in all events nothing was rested on any "public function" theory. *Watson* v. *Memphis*, 373 U. S. 526, ordering speedy desegregation of parks in that city, concerned recreation facilities concededly owned or managed by the city government. See 303 F. 2d 863, 864–865.[4] The only Fourteenth Amendment case[5] finding state action in the "public function" performed by a technically private institution is *Marsh* v. *Alabama*, 326 U. S. 501, holding that a company-owned town of over 1,500 residents and effectively integrated into the surrounding area could not suppress free speech on its streets in disregard of constitutional safeguards. While no stronger case for the "public function" theory

[4] The majority's language directly following its *Watson* citation (*ante*, p. 6)—"and state courts that aid private parties to perform that function [mass recreation through the use of parks] on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment"—quite evidently is oblique reliance on *Shelley* v. *Kraemer*, 334 U. S. 1, which the majority does not even cite. Whatever may be the basis of that inscrutable decision, certainly nothing in it purports to rest on anything resembling the "public function" theory.

[5] In *Terry* v. *Adams*, 345 U. S. 461, cited by the Court, none of the three prevailing opinions garnered a majority, and some commentators have simply concluded that the state action requirement was read out of the Fifteenth Amendment on that occasion. Lewis, The Meaning of State Action, 60 Col. L. Rev. 1083, 1094 (1960); Note, The Strange Career of "State Action" Under the Fifteenth Amendment, 74 Yale L. J. 1448, 1456–1459 (1965).

can be imagined, the majority opinion won only five of the eight Justices participating, one of whom also concurred separately, and three spoke out in dissent. The doctrine of that case has not since been the basis of other decisions in this Court and certainly it has not been extended. On the contrary, several years after the decision this Court declined to review two New York cases which in turn held *Marsh* inapplicable to a privately operated residential community of apartment buildings housing 35,000 residents, *Watchtower Bible & Tract Soc'y* v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. 2d 433, certiorari denied, 335 U. S. 886, and to a privately owned housing development of 25,000 people alleged to discriminate on racial grounds, *Dorsey* v. *Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541, certiorari denied, 339 U. S. 981. See also *Hall* v. *Virginia*, 335 U. S. 875, dismissing the appeal in 188 Va. 72, 49 S. E. 2d 369.

More serious than the absence of any firm doctrinal support for this theory of state action are its potentialities for the future. Its failing as a principle of decision in the realm of Fourteenth Amendment concerns can be shown by comparing—among other examples that might be drawn from the still unfolding sweep of governmental functions—the "public function" of privately established schools with that of privately owned parks. Like parks, the purpose schools serve is important to the public. Like parks, private control exists, but there is also a very strong tradition of public control in this field. Like parks, schools may be available to almost anyone of one race or religion but to no others. Like parks, there are normally alternatives for those shut out but there may also be inconveniences and disadvantages caused by the restriction. Like parks, the extent of school intimacy varies greatly depending on the size and character of the institution.

For all the resemblance, the majority assumes that its decision leaves unaffected the traditional view that the Fourteenth Amendment does not compel private schools to adapt their admission policies to its requirements, but that such matters are left to the States acting within constitutional bounds. I find it difficult, however, to avoid the conclusion that this decision opens the door to reversal of these basic constitutional concepts, and, at least in logic, jeopardizes the existence of denominationally restricted schools while making of every college entrance rejection letter a potential Fourteenth Amendment question.

While this process of analogy might be spun out to reach privately owned orphanages, libraries, garbage collection companies, detective agencies, and a host of other functions commonly regarded as nongovernmental though paralleling fields of governmental activity, the example of schools is, I think, sufficient to indicate the pervasive potentialities of this "public function" theory of state action. It substitutes for the comparatively clear and concrete tests of state action a catchphrase approach as vague and amorphous as it is far-reaching. It dispenses with the sound and careful principles of past decisions in this realm. And it carries the seeds of transferring to federal authority vast areas of concerns whose regulation has wisely been left by the Constitution to the States.